National Library of Canada

Acquisitions and Bibliographic Services Branch

395 Wellington Street
Ottawa, Ontario
K1A 0N4

Bibliothèque nationale du Canada

Direction des acquisitions et des services bibliographiques

395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file Votre référence

Our file Notre référence

NOTICE

The quality of this microform is heavily dependent upon the quality of the original thesis submitted for microfilming. Every effort has been made to ensure the highest quality of reproduction possible.

If pages are missing, contact the university which granted the degree.

Some pages may have indistinct print especially if the original pages were typed with a poor typewriter ribbon or if the university sent us an inferior photocopy.

Reproduction in full or in part of this microform is governed by the Canadian Copyright Act, R.S.C. 1970, c. C-30, and subsequent amendments.

AVIS

La qualité de cette microforme dépend grandement de la qualité de la thèse soumise au microfilmage. Nous avons tout fait pour assurer une qualité supérieure de reproduction.

S'il manque des pages, veuillez communiquer avec l'université qui a conféré le grade.

La qualité d'impression de certaines pages peut laisser à désirer, surtout si les pages originales ont été dactylographiées à l'aide d'un ruban usé ou si l'université nous a fait parvenir une photocopie de qualité inférieure.

La reproduction, même partielle, de cette microforme est soumise à la Loi canadienne sur le droit d'auteur, SRC 1970, c. C-30, et ses amendements subséquents.

Canada

UNIVERSITY OF ALBERTA

INTERNATIONAL HUMAN RIGHTS AND IN PARTICULAR REFERENCE TO THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS

BY

©

HIROSHI MORITA

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of **MASTER OF LAWS**

FACULTY OF LAW
EDMONTON, ALBERTA
FALL, 1993

National Library
of Canada

Acquisitions and
Bibliographic Services Branch

395 Wellington Street
Ottawa, Ontario
K1A 0N4

Bibliothèque nationale
du Canada

Direction des acquisitions et
des services bibliographiques

395, rue Wellington
Ottawa (Ontario)
K1A 0N4

Your file Votre référence

Our file Notre référence

The author has granted an irrevocable non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of his/her thesis by any means and in any form or format, making this thesis available to interested persons.

L'auteur a accordé une licence irrévocable et non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de sa thèse de quelque manière et sous quelque forme que ce soit pour mettre des exemplaires de cette thèse à la disposition des personnes intéressées.

The author retains ownership of the copyright in his/her thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without his/her permission.

L'auteur conserve la propriété du droit d'auteur qui protège sa thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

ISBN 0-315-88301-4

Canada

UNIVERSITY OF ALBERTA

RELEASE FORM

NAME OF AUTHOR: **HIROSHI MORITA**

TITLE OF THESIS: **INTERNATIONAL HUMAN RIGHTS AND IN PARTICULAR REFERENCE TO THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS**

DEGREE: **MASTER OF LAWS**

YEAR THIS DEGREE GRANTED: **FALL, 1993**

Permission is hereby granted to the University of Alberta Library to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only.

The author reserves all other publication and other rights in association with the copy right in the thesis, and except as hereinbefore provided neither the thesis nor any substantial portion thereof may be printed or otherwise reproduced in any material form whatever without the author's prior written permission.

Hiroshi Morita

Hiroshi Morita
Tsutsumicho 3-1, Mikasashi,
Hokkaido, 068-21 JAPAN

Date: Aug. 4 1993

UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommended to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled **INTERNATIONAL HUMAN RIGHTS AND IN PARTICULAR REFERENCE TO THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS** submitted by **HIROSHI MORITA** in partial fulfilment of the requirements for the degree of **MASTER OF LAWS**.

Professor L.C.Green

Richard W. Bauman

Professor R.W.Bauman

G. L. Gall

Professor G.L.Gall

L R Pratt

Professor L.R.Pratt

Date: July 30th 1993

Dedicated to my parents.

ABSTRACT

Human rights was regarded as "a matter within the domestic jurisdiction" of each State under traditional international law which purported only to govern relations between nation-states. World War II was a turning point, inspiring the internationalization of human rights, whereby individuals are not regarded as objects, but as subjects of international law with rights and remedies that are justiciable in both domestic and international fora. The voluntary non-governmental movements, which arose as part of this process, representing the moral face of the world community, have played a substantial role.

This thesis mainly focuses upon two aspects of international human rights issues. One is the philosophical and historical backgrounds which have elevated this "domestic matter" to the international legal plane. The other is the role played by non-governmental organizations (NGOs) which have been significant catalysts in the promotion and protection of international human rights. The appraisal of these issues is intended to support further NGO activities regarding law-making and implementation for international human rights.

This study is introduced in Chapter One with a review of human rights concepts from both Western and non-Western cultural perspectives. This analysis is intended both to understand the theoretical impetus to internationally recognized human rights and to lay a conceptual frame for discussion of categorical norms of human rights.

Chapter Two examines historical movements concerned with international

human rights legislation, making reference to the involvement of NGOs. The legal character of respective instruments will be briefly discussed.

Based on the recognition that NGOs are in a position to maintain an apolitical stance, Chapter Three discuss how NGOs can contribute to the implementation of human rights on the international scene. Consideration is given from the two viewpoints: within the framework of inter-governmental organizations and outside inter-governmental machineries.

This study is concluded in Chapter Four with an examination of the background of the beneficial role played by NGOs and their special responsibility in international human rights movements. By appraising the problems facing NGOs and the limitations of their initiatives, this chapter proposes legal reforms relating to NGOs for reinforcing the legal basis of their certain activities.

ACKNOWLEDGEMENT

I wish to express my appreciation and gratitude to my thesis supervisor Professor Leslie C.Green for his invaluable comments, guidance and encouragements. I am also grateful to Professor G.L.Gall and Professor L.R.Pratt for consenting to serve on my examining committee. My sincere gratitude also goes to the chairperson of the Graduate Study Committee of the Faculty of Law, Professor R.W.Bauman, for his support all through this programme and for agreeing to serve as a faculty examiner.

I am most grateful to the staff of the John A. Weir Law Library, and in particular Sandra Wilkins and Mike Strozuk, for their advice and assistance. My special thanks goes to Eric Wagner for his constant assistance and patient support.

I must also express my thanks to the Alberta Government for granting financial support in the form of the Scholarship of the Ministry of Advanced Education without which I would not have been able to undertake this study programme. My thanks also goes to the Hokkaido Government for assigning me to pursue this programme.

Finally, I wish to acknowledge the valuable time shared with many wonderful people in Alberta, in particular, Mr. and Mrs. Paul Martel for their hospitality, Helen Chen, Francis Abiew and Quanxi Zheng for their guidance in this programme, and Steve Fylypchuk and Ron Huber for their friendship and help introducing me to "Canadian life".

TABLE OF CONTENTS

CHAPTER I. HUMAN RIGHTS: HISTORICAL FOUNDATION AND CATEGORIZATION

A. Historical and Philosophical Survey of Human Rights 1

1. Western Concepts of Human Rights: Natural Law 1

a. Natural Law in Ancient Times 2

b. Natural Law in the Middle Ages 4

c. Natural Law in Recent Times: Natural Rights 5

d. Influence of Natural Rights upon Constitutions 6

e. Reaction against Natural Law 8

f. The Renaissance of Natural Rights and Its Influence upon International Human Rights 11

2. Non-Western Concepts of Human Rights 13

a. Islamic Perspective 14

b. Traditional African Perspective 17

c. Traditional Asian Perspective 18

(1) Hindu India 19

(2) Chinese Perspective 21

(3) "*Bushido*" in Japan 22

d. Concluding Observation 25

B. Distinguishing Human Rights Criteria 29

1. Three Generations of Human Rights 30

a. Priority and Legitimacy 33

2. Individual Rights and Collective Rights.......... 35
    a. Concluding Observation.......... 41

CHAPTER II. INTERNATIONAL HUMAN RIGHTS: HISTORICAL SURVEY

A. Pre-World War II.......... 45
  1. The Protection of Aliens.......... 46
  2. The Abolition of Slavery.......... 47
    a. The Anti-Slavery Society.......... 51
  3. The Protection of Minorities.......... 53
  4. The League of Nations.......... 57
  5. International Labour Legislation.......... 59
  6. International Humanitarian Law.......... 61
    a. Historical Tradition.......... 62
    b. Modern Development.......... 64
B. Post-World War II: Human Rights in the United Nations.......... 67
  1. The Charter of the United Nations.......... 68
  2. The Universal Declaration of Human Rights.......... 71
  3. The International Covenants on Human Rights and the Optional Protocol.. 76
    a. Obligations of the State Party.......... 76
  4. Human Rights Standard-Setting and NGOs.......... 79
    a. The San Francisco Conference.......... 79
    b. The United Nations Charter.......... 80
    c. The International Bill of Human Rights.......... 83

d. Other U.N. Human Rights Instruments 84
  (1) The Abolition of Torture 86
  (2) The Rights of the Child 86
  (3) The Rights of Indigenous People 88
e. Concluding Remarks 90

CHAPTER III. IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS AND THE ROLE OF NGOs

A. Human Rights Actors in the Area of Implementation 96
B. Implementation Using Inter-Governmental Machineries 100
  1. The Human Rights Committee 100
    a. Periodic Reporting System 101
    b. Inter-State Complaints 103
    c. The Optional Protocol: Individual Communications 105
    d. Cooperation between NGOs and the Human Rights Committee 109
  2. The Commission on Human Rights 111
    a. ECOSOC Resolution 1503 112
      (1) Problems in the Procedure 113
        (a) Formality 113
        (b) Confidentiality 115
    b. Written and Oral Statements 117
    c. Criticism against NGO Intervention 120
  3. The Recent United Nations Approach and Actions 126

a. The Security Council's Approach to Implementation of Humanitarian Law 126
b. Humanitarian Intervention on the Authority of the U.N. 129
c. Appraisal of the U.N. Approach 132
C. Implementation outside of Inter-Governmental Machineries 136
1. Public Opinion 136
2. Fact-finding Missions 140
3. Diplomatic Initiatives 142

CHAPTER IV. CONCLUSION

A. Global Human Rights Movements and NGOs: Background 145
1. The Frustration of the U.N. Human Rights Machineries 146
2. Vertical Expansion of the International Community 149
B. Remaining Problems in NGO Activities 151
1. The Expansion of NGOs' Mandate 152
2. The Selection of Cases 155
3. Inattention to Structural Factors 157
4. NGO Initiative and State Foreign Policy 159
5. Legal Status of NGOs 163
a. The Right to Visit Political Prisoners 163
b. The Right to Humanitarian Assistance 165
c. The Official Status of Access to the International Organs 167
C. Endless Struggles toward an International Conscience 171
Bibliography 175

LIST OF ABBREVIATIONS

A.F.L.-C.I.P.	The American Federation of Labour and Congress of Industrial Organizations
A.I.	Amnesty International
C.B.J.O.	The Coordinating Board of Jewish Organizations
D.C.I.	The Defence for Children International
D.P.I.	Disabled Peoples' International
E.C.O.S.O.C.	The Economic and Social Council
E.C.S.C.	The European Coal and Steel Community
E.E.C.	The European Economic Community
E.S.C.O.R.	The U.N. Economic and Social Council Official Records
E.U.R.A.T.O.M.	The European Atomic Energy Community
G.A.O.R.	The U.N. General Assembly Official Records
I.C.H.P.	The International Commission of Health Professionals
I.C.J.	The International Commission of Jurists
I.C.J. Report	International Court of Justice Report
I.C.R.C.	The International Committee of the Red Cross
I.G.O.s.	Inter-Governmental Organizations
I.L.H.R.	The International League for Human Rights
I.L.O.	International Labour Organization
I.M.F.	International Monetary Fund
J.C.L.U.	The Japan Civil Liberties Union
N.A.A.C.P.L.D.F.	The National Association for the Advancement of Coloured People Legal Defence and Educational Fund

N.G.O.s	Non-Governmental Organizations
O.A.S.	The Organization of American States
O.A.U.	The Organization of African Unity
P.C.I.J.	The Permeant Court of International Justice
S.C.I.U.	Save the Children International Union
U.D.H.R.	The Universal Declaration on Human Rights
U.N.	The United Nations
U.N.E.S.C.O.	The United Nations Educational, Scientific, and Cultural Organization
U.N.I.T.A.R.	The United Nations Institute for Training and Research
U.N.T.S.	United Nations Treaty Series
W.C.R.P.	The World Conference of Religion and Peace
W.H.O.	World Health Organization
W.J.C.	The World Jewish Congress

CHAPTER I

HUMAN RIGHTS: HISTORICAL FOUNDATION AND CATEGORIZATION

A. Historical and Philosophical Survey of Human Rights

1. Western Concept of Human Rights: Natural Law

In considering "human rights"[1] in a philosophical and historical context, it is generally understood that the main doctrine of human rights has its origins in the liberal democratic tradition of Western Europe - that tradition being described as the product of Greek philosophy, Roman law, the Judaeo-Christian tradition, the humanism of the Reformation and Age of Reason.[2] In the history of political and legal thought, this doctrine has been developed with regard to the relationship of the individual and the State, viz., his/her protection against State action.

According to Hersch Lauterpacht, this question has consisted of two conflicting factors regarding the State's functions: first, "the State has no justification and no valid rights to exact obedience except for securing welfare of the individual human being"; and second, "the State has come to be recognized as the absolute condition of the civilized extension of man and of his progression toward the full realization of his faculties".[3] In reality these factors have resulted in numerous arbitrary actions on the part of the State *vis-a-vis* the individual.

---

[1] "Human rights" is a relatively new term, gaining currency since World War II and the founding of the United Nations in 1945. They have been traditionally known as "the rights of man" or "natural rights", which was intimately linked to the concept of natural law. See M.Cranston, *What are Human Rights ?* (London: The Bodley Head, 1973), at 1. For the linkage of natural law and natural rights, see *infra*, pp.5-6.

[2] A.H.Robertson, *Human Rights in the World* (New York: Manchester University Press, 1989), p.3. See also E.Kamenka, and A.E.S.Tay, *Human Rights* (London: E.Arnold, 1978), Chapters 1 and 2.

The concept of natural law, delimiting the early power of the State,[4] has contributed to bridge these conflicting factors. Subsequently, this idea led to natural rights theory, which has played a principal part and led "the continuous thread" in the evolution of legal and philosophical thoughts.[5]

a. Natural Law in Ancient Times

The idea of natural law dates back to ancient Greek and Roman philosophies. In the classical literature of Ancient Greece from the fifth century B.C., it is said that the law established by God stands above the obligations imposed by the rulers of the community.[6] The man-made law, *de facto* rules of governors in power, was respected only as far as it is consistent with that higher law, viz., the law of God.[7]

---

[3] Lauterpacht, *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945), p.16.

[4] As for the substance of natural law, Lauterpacht pointed out four factors: (1) the denial of the absoluteness of the State and of its unconditional claim to obedience; (2) the assertion of the value and of the freedom of the individual as against the State; (3) the view that the power of the State and of its rulers is derived ultimately from the assent of those who compose the political community; and (4) the insistence that there are limits to the power of the State to interfere with man's rights to do what he conceives to be his duty. *Ibid.*, p.17.

[5] Lauterpacht, *International Law and Human Rights* (Connecticut: Archon Books, 1968), p.80.

[6] See F.Castberg, "Natural Law and Human Rights: An Idea-Historical Survey" in Asjorn Eide and August Schou ed., *International Protection of Human Rights* (Stockholm: Almquvist and Wiksell, 1967), p.13. Herodotus pointed out that citizens of certain Greek cities enjoyed such rights as *isonomia*, equality before law, and *isogolia*, equal freedom of speech. Herodotus, *History* (Cary's translation, 1882), Book III, p.80, quoted by Lauterpacht, *supra*, n.5, p.81.

[7] Castberg, *ibid.*

According to Greek Stoicism, the school of philosophy founded by Zeno of Citium, a universal working force pervades all creation, thus human conduct should be judged in accordance with "the Law of Nature".[8] Under the universal order, the immutable law of gods, all men are free and one may not distinguish between rich and poor, or Greek and barbarian.[9]

The Stoics subsequently had influence upon the Roman legal doctrine, which distinguished between the *jus civile*, the law enacted by a State for its subjects, and the *jus gentium*, the law that commonly affected all nations. The Greek theory of a law of nations, *jus naturale* which had been alien to the Roman doctrine, was adopted by Roman law.[10] Under the Roman law slavery was ruled by the *jus civile* and part of the *jus gentium* - since it existed among all people - though it conflicts with the *jus naturale*, natural law, since all people were originally born free and equal. By explaining the humanitarian decrees of the Emperors for the protection of slaves, proponents of natural law served to introduce the idea of freedom and equality of man into Roman law.[11]

---

[8] See Burn H.Weston, "Human Rights" in B.Weston and R.Claude ed., *Human Rights in the World Community* (Philadelphia: University of Pennsylvania Press, 1989), p.13. In this regard Coleman Phillipson noted that universal law, "consisting almost exclusively of traditional usages and principles spontaneously enforced by human conscience, were thought to be applied to men as men, and irrespective of race and nationality." Phillipson, *International Law and Custom of Ancient Greece and Rome* (London: MacMillan, 1911), Vol.I, p.59.

[9] Lauterpacht, *supra*, n.5, p.83.

[10] Roman jurists, Cicero and Ulpian, were instrumental in spreading this idea to Roman law. See Lauterpacht, *supra*, n.5, pp.83-84; Castberg, *supra*, n.6, pp.14-15. For a process of dissemination of *jus naturale* to Roman law, see Phillipson, *supra*, n.8, pp.91-98.

[11] Lauterpacht, *supra*, n.5, p.84.

b. Natural Law in the Middle Ages

During the Greco-Roman times, natural law theory mainly emphasized duties seen as imposed by gods. The works of the Middle Ages continued to stress universal religious and moral norms based on the principal ideas of the Stoics. For instance, St.Thomas Aquinas, the authority of the Catholic Church in legal philosophy, maintained that the State was subject to a "higher law": natural law, which determines the relation of the individual to the State.[12] In his view, natural law conferred certain immutable rights upon individuals as part of the law of God.[13]

Hugo Grotius, known as a "father" of modern international law, marked a clear break with the older doctrine of natural law. He detached natural law from religion and laid the groundwork for the secular, rationalistic version of modern natural law. Grotius writes in his work *De Jure Belli et Pacis*:

> The law of nature, again, is unchangeable - even in the sense that it can not be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend; for things of which this is said are spoken only, having no sense corresponding with reality and being mutually contradictory.[14]

It has been said that this modernized and secularised view marked a turning-point in the history of thinking.[15]

---

[12] He defined natural law as "the participation in the eternal law of the mind of a rational creature." *Summa*, 1a, 2ae, qu. 91, art 2.

[13] *Summa Theologica* pt.II, 1st pt.

[14] 1625, Bk.I, Ch.I, s.x (Carnegie tr.: New York: Oceana Publication Inc., 1964), p.40.

[15] Passerin D'Entreves, *Natural Law* (London: Hutchinson's University Library, 1951), p.70

c. Natural Law in Recent Times: Natural Rights

In the seventeenth century the concept of natural law put more stress on the rights of the individual than objective norms. Eventually this resulted in the creation of the theory of natural rights. This trend is expressed as the shift from "a theory of law" to "a theory of rights".[16] The main exponent of this new theory was John Locke who developed his social philosophy of individualism as part of his theories of political systems.

Locke proposed the concept of an original state of nature before civil society or any State power had been organized, where certain rights self-evidently pertain to individual human beings. These rights are the rights to life, property, and freedom from arbitrary rule. Even if some rights of individuals were surrendered to the State, such surrender was intended to allow enforcement of their original rights by the State, not to abandon the natural rights themselves. These rights were always retained in the individual and were thus eternal and inalienable.

In a society founded on a "social contract", Government was obliged to secure the fundamental rights of its subjects. "Government is not their master: it is created by the people voluntarily and maintained by them to secure their own good".[17] If government neglected this obligation, it would forfeit its validity. Locke justified peaceful revolution in such a case.

---

[16]. D'Entreves, *ibid.*, p.59. With respect to this evolution, Heinrich Rommen observes that "[t]he concept of natural law had thus degenerated from an objective metaphysical idea into a political theory which sought to justify and promote definite political change." Rommen, *The Natural Law* (London: B.Herder Book Co., 1947), p.90.

[17]. Richard Aaron, *John Locke* (London: Oxford University Press, 1937), pp.270-271.

At the time there was scepticism about Locke's theory, particularly about "the state of nature". In fact, Locke, being unable to define the real meaning of moral philosophy, could not clarify the existence of such a state. By accepting "a fiction" of "imaginary construction"[18], the theory of natural rights was intended to discover universally valid principles, aiming to lead government to respect the inalienable rights of man. Its philosophical impetus was undeniably significant, which can be observed in the evolution of constitutional law.

d. Influence of Natural Rights upon Constitutions

The philosophy of natural rights had great influence upon the civilized world in the late eighteenth and early nineteenth centuries.[19] Thomas Jefferson, who had studied Locke, asserted that Americans were a "free people claiming their rights as derived from the law of nature and not as the gift of their chief Magistrate."[20] His belief in "the immutable law of nature" became the principal source for the Declaration of Independence in 1776, of which the second sentence expresses that "We hold these truths to be self-evident, that all men are equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness."

---

[18]. Castberg, *supra*, n.6, p.19.

[19]. The influence of natural rights on the Western world was reinforced by the English revolution in 1688 and the resulting Bill of Rights. English contribution to the legal and philosophical thought of the American and French Declarations is highly regarded. See Lauterpacht, *supra*, n.5, Chapter 8.

[20]. As quoted by Robertson, *supra*, n.2, p.5.

By following the English and American models, Lafayette, a member of the drafting committee of the French Constituent Assembly, produced the "Declaration des Droits de l'Homme et du Citoyen", the French Declaration of the Rights of Man and the Citizen, of 1789.

From the viewpoint of literature, the French Declaration as a national positive law has the clearest expression of the concept of natural rights - the inalienable rights of the individual *via-a-via* the State - based upon the natural law concept, proclaiming that "the aim of every political association is the preservation of the natural and imprescriptible rights of man".[21] These rights are defined as "liberty, property, safety and resistance to oppression." Moreover, the Declaration specifies the rights to free speech, a free press, religious freedom and freedom from arbitrary arrest. One writer has observed that the French Declaration was more "advanced" than America's.[22]

In sum, the idea of the natural rights of man has played a key role in the American and French revolutions, as a philosophical foundation against Great Britain (in America) and against the *ancien regime* in France. Inevitably, they were political rights[23] and this political current has spread over many Western countries which incorporated the idea into their constitutions.[24]

---

[21]. As quoted by Robertson, *ibid.*, p.3.

[22]. Louis Henkin, *The Rights of Man Today* (Colorado: Westview Press, 1978), p.13; Castberg, *supra*, n.6, p.19.

French legal thought, which was heavily influenced by the concept of natural law, had influence upon Japanese intellectuals a century later. After the Meiji restoration of 1868, Elime G.Boissonade, French advisor to the Meiji government, gave lectures on natural law in Japan. He had played an instrumental role in drafting of the civil code of 1890, although this never came into effect. French legal thought was eventually replaced by the example of German law which had a dominant influence upon the Meiji regime. See *infra*, pp.9-10, n.34. For a detailed account of the influence of French legal thought on Japan, see K.Takayanagi, "A Century of Innovation: The Development of Japanese Law, 1869-1961" in A.Mehren ed., *Law in Japan* (Mass: Harvard University Press, 1963), pp.5-40.

e. Reaction against Natural Law

The doctrine of natural rights was not without detractors. During the late eighteenth to early twentieth centuries, it came under philosophical and political attack. The assault upon natural rights stemmed from utilitarianism and empiricism, which stressed the durable and effective protection of human rights.

Jeremy Bentham, the founder of classical utilitarianism, sharply criticized the imaginary nature of natural law in that it constitutes not real rights but a rhetorical ideal. In his essay, *Anarchical Fallacies*,[25] written in response to the French Declaration of the Rights of Man of 1789, he described the doctrine of natural rights as "bawling upon papers," not only "nonsense" but "nonsense upon stilts."[26] He argued that every political decision should be based upon a calculation which maximizes the net product of pleasure over pain such that governments are required to maximize the total net sum of the happiness of all their subjects. In contrast to natural rights theory, which is in favour of the specific basic interests of individuals, utilitarianism adoptes as its ultimate criterion of value the maximization of aggregate desires or the general welfare of the public.

---

[23] Henkin, *supra*, n.22, p.10. Robertson describes them as "the human rights conception of one political culture, that of the parliamentary democracies". *Supra*, n.2, p.7.

[24] The recognition of fundamental rights of man became a general principle of the constitutional law of civilized States. Sweden adopted it in 1809; Spain in 1812; Norway in 1814; Holland in 1815; Belgium in 1831; Liberia in 1847; the Kingdom of Sardinia in 1848; Denmark in 1849; Prussia in 1850; and Switzerland in 1874.

[25] Bentham, *Anarchical Fallacies* in J.Bowring ed., *The Works of Jeremy Bentham* (Edinburgh: Tait, 1843), Vol.II.

[26] *Ibid.*, p.494, p.501.

Edmund Burke, even though a believer in natural law in England, criticized the drafters of the French Declaration of 1789 for proclaiming the "monstrous fiction" of human equality, which arguably serves to inspire "the false ideas and vain expectations in men destined to travel in the obscure walk of laborious life."[27] John Stuart Mill, despite his vigorous defense of liberty, maintained that rights ultimately were founded upon utility. Being the ultimate appeal on all ethical questions, utility must be grounded in the paramount interests of man as a progressive being.[28]

Having been attacked by those who were frightened by the revolutionary movements proclaiming the rights of man, natural rights doctrine became a target of the authoritarian regimes, together with condemnation by the Idealist and Marxist philosophers. David Ritchie maintained that "the person with rights and duties [was] the product of society", thus the rights of the individual must be judged from the viewpoint of society as a whole.[29]

Most Hegelian idealists of the nineteenth century and positivists of the twentieth have been opposed to the doctrine of natural rights. Some idealist philosophers admitted to a concept of rights belonging to collective entities such as societies and communities, but not to the individual apart from such collective entities.[30] This notion was reflected in the national positive law of Germany and Japan. The German Constitution of 1849,[31] which was established by the nationalist German liberals, did not take an individual stance towards citizens' rights, speaking of the rights of "the German People".[32] Similarly, in the Constitution of the Empire of Japan (Meiji Constitution) of 1889,[33] the preamble refers to "the rights of Our people", and Chapter II is concerned with the Rights and Duties of "Subjects".[34]

---

[27]. Burke, *Reflections on the Revolution in France, Work* (Boston; Franklin Press, 1852), IV, pp.180-181.

[28]. Mill, *On Liberty* (1880, reprinted by Oxford: Blackwell, 1946), p.6.

[29]. Ritchie, *Natural Rights* (Connecticut: Hyperion Press, 1979, reprint of the 1952 ed., published by London: G.Allen and Unwin), pp.101-102.

As German idealism and European nationalism emerged in the late nineteenth century, individual rights came to be suppressed under the ultimate value of, in the words of F.H.Bradley, "the welfare of the community".[35] Bradley, the British Idealist, wrote in 1894:

> The rights of the individual are today not worth serious criticism.... The welfare of the community is the end and is the ultimate standard. And over its members the rights of its moral organism is absolute. Its duty and its right is to dispose of these members as seems to it best.[36]

---

[30] Cranston, *supra*, n.1, p.3.

[31] For the text of the Constitution, see e.g., Elmer M.Hucko, *The Democratic Tradition: Four German Constitutions* (New York: St.Martin's Press, 1989), pp.77-117.

[32] *Ibid.*, p.104. Article 130 in Part VI (The Fundamental Rights of the German People).

[33] For the text, see e.g., Hideo Tanaka, *Japanese Legal System* (Tokyo: University of Tokyo Press, 1975), pp.16-24.

[34] *Ibid*. The Meiji Constitution was intended to establish a constitutional monarchy which copied that of the German Empire. See K.Takayanagi, *supra*, n.22, pp.6-12.

[35] Bradley, "Some Remarks on Punishment"(1894), International Journal of Ethics (reprinted in *Collected Essays* Vol.I (Oxford: Clarendon Press, 1935), p.158.)

[36] *Ibid.*

This trend away from natural rights and toward a more authoritarian, State-oriented view of rights continued until the end of World War II.

f. The Renaissance of Natural Rights and its Influence upon International Human Rights

The inhumane tragedies of World War II, e.g., the atrocities committed by Nazi Germany, inspired legal and political philosophers to seek respect for human beings, introducing morality to their legal thought. This led to "the renaissance of the law of nature" arising as the "unmistakable result of the urge to find a spiritual counterpart to the growing power of the modern State", which brought about "the widespread sense of danger" in the world.[37]

The realization of morality and humanity in legal thought led to the philosophical reliance on the concept of natural rights. Meanwhile, the revival of natural rights necessitated the re-interpretation and reconstruction of its own theory within the framework of positive law.

Modern human rights theory based on natural rights adopts "a qualified natural law approach"[38] in which it tries to identify those values having an eternal aspect. It also includes the concept of positive law to the extent that these values can function as an effective legal system. Henkin observes this trend, saying that:

> [the modern theory] seeks support today in contemporary values of

---

[37]. Lauterpacht, *supra*, n.5, p.112.

[38]. J.J.Shestack, "The Jurisprudence of Human Rights" in T.Meron ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), p.86.

> individual worth and societal need, values that are derived from human psychology and from sociology and that are expressed in positive law.[39]

Thus, the principal objective is to bridge the gap between natural law and positive law by converting natural human rights into positive human rights or vice-versa.[40]

This refined natural rights concept has contributed to the international recognition of human rights in the last half of the twentieth century and produced a beneficial influence on international human rights norms.[41] The influence is found in the Charter of the United Nations where all members pledged themselves to take joint and separate action for the achievement of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Moreover, the Universal Declaration of Human Rights (1948) proclaims "[w]hereas recognition of the inherent dignity and of the eternal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...." These articulations reflect the natural law philosophy that individuals are entitled, irrespective of culture or civilization, to certain basic and inalienable rights.

---

[39]. *Supra*, n.22, p.29.

[40]. For a new natural rights approach, see e.g., J.Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); E.Bodenheimer, *Jurisprudence* (Cambridge: Harvard University Press, 1974), Chap.IX.

[41]. In this regard Henkin properly addressed the association between natural law and positive law:

> [T]he impulse to develop an international positive law of human rights may reflect a sense that such rights are "natural" and required by natural law, and the rights legislated into international law may be those considered natural rights.... the positive international law of human rights, like the positive national law of human rights, did not eliminate all reliance on, or preclude all reference to, non-positive "natural" principles.

Supra, n.22, pp.22-23.

2. Non-Western Concept of Human Rights

Natural rights theory, which is regarded as a product of Western liberal thought,[42] has indeed played a dominant role in elevating human rights to the international plane. Nevertheless, this conceptual approach does not necessarily have universal acceptance throughout the world. For instance, Pollis and Schwab sharply criticized the established human rights norms by expressing an objection to ethnocentrism:

> Unfortunately not only do human rights set forth in the Universal Declaration reveal a strong western bias, but there has been a tendency to view human rights ahistorically and in isolation from their social, political, and economic milieu.[43]

In light of the preamble of the two International Covenants on Human Rights,[44] which state that "these rights derive from the inherent dignity of human person",[45] one is likely to assume that human rights exist as measures to realize and protect human dignity seen from the Western perspective. In non-Western countries, however, some societies have traditional and elaborate systems to realize human dignity which is culturally defined in terms of the fulfilment of one's obligation to the group.

---

[42] Jack Donnelly contends that as a matter of "historical fact, the concept of human rights is an artifact of modern western civilization". Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights"(1982), 76 American Political Science Review, p.303.

[43] Adamantia Pollis and Peter Schwab, "Human Rights : A Western Construct with Limited Applicability" in Pollis and Schwab ed., *Human Rights: Cultural and Ideological Perspective* (New York: Praeger Publisher, 1979), p.17. The World Conference on Human Rights in Vienna, held June 14 through 25, 1993, manifested a paradigm of this confrontation between West and non-West, or developed and developing nations. The process of organizing the Conference has been plagued by disagreements over such basic issue, as shall be seen below, as what constitutes human rights. See "Whose Human Rights" *The [Toronto] Globe and Mail* (June 3 1993) A22; Boo Tion Kwa, "Righteous Talk" *Far Eastern Economic Review* (June 17 1993) p.28.

[44] The International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. For the text, see e.g., Ian Brownlie, *Basic Documents of Human Rights* (Oxford: Clarendon Press, 3rd ed, 1992).

a. Islamic Perspective

Muslim objections to the Western conception of human rights were first raised in 1948 during the debate at the U.N. on the text of the Universal Declaration of Human Rights (hereinafter the Declaration).[46] Controversy arose regarding Article 18 of the Declaration which states:

> Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others in public or in private, to manifest his religion or belief in teaching, practice, worship and observance.

A number of Islamic countries, such as Saudi Arabia and Egypt, attempted to delete this article.[47] Failing that, they blamed some Islamic countries, for example Lebanon, for supporting the article because, they contended, the rights of Lebanese

---

[45] *Ibid.*

[46] G.A. Res. 217 A, U.N. Doc. A/810 (1948). For the text, see Brownlie, *ibid.*

[47] Such countries considered the philosophical and political assumption underlying this article to be incompatible with Sharia (traditional Islamic law). See Amyn B.Sajoo, "Islam and Human Rights: Congruence or Dichotomy?"(1989), 4 Temple International and Comparative Law Journal, p.24.

Muslims would be compromised by such wording.[48] Likewise, objections were raised by the same countries at the drafting discussion of the International Covenant on Civil and Political Rights, on the articulation of the right to religious freedom (Article 18, sec.2).[49] As a recent example, the Salman Rushdie affair in 1989 manifested a philosophical and ideological conflict between Western liberalism and Islam.[50]

A brief account of the Islamic perspective can be given as follows.[51] Ultimate sovereignty in the Muslim world is vested in Allah (God). Under this sovereignty all man-made law must be considered as subservient, and the individual and *ummah*, or community, enjoy the status of vicegerency of Allah. In Islam "human rights" are, according to the *Koran* and the *Sunnah* of the Prophet, "a consequence of human obligations and not their antecedent"[52]. As a result of fulfilling these obligations, persons gain certain rights and freedoms, or privilege, that are outlined by the Divine Law. Such rights, having been ordained by Allah, can not be abrogated or withdrawn permanently by human acts, including State action, so that "[those rights] are inalienable, perpetual and eternal".[53]

---

[48] David Little et al, *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (Columbia: University of South Carolina Press, 1988), p.5. Sajoo takes a flexible stance to the Western concept, saying that "the fundamentals of the Declaration are integral, not alien to the ideas of a non-Western system like Islam, which advocates equality with the integrity of the person." Sajoo, *supra*, n.47, p.28.

[49] Little et al, *supra*, n.48. A commentator explained that according to the Islamic perspective, "[t]here is no freedom possible through flight from and rebellion against the Principle, which is the ontological source of human existence and which determines ourselves from on high." Seyyed H.Nasr, "The Concept and Reality of Freedom in Islam and Islamic Civilization" in Alan S.Rosenbaum ed., *The Philosophy of Human Rights : International Perspective* (Connecticut: Greenwood Press, 1980), p.96.

[50] On February 14, 1989, Ayatollah Khomeini, the Iranian leader, urged all Muslims throughout the world to execute Salman Rushdie, Indian-born British author, for publishing the book *The Satanic Verses* (1988), which Khomeini considered as profane to Islam. The author claimed that the book was not profane and went into hiding. Some theological scholars of Islam, however, observed that the Ayatollah's order contravened Islamic law. One senior scholar said, "In Islam there is no tradition of killing people without trying them." See "Clerics Challenge Rushdie 'Sentence'", *The [New York] Times* (18 Feb. 1989) A6.

[51] The reference to the Islamic doctrine is based on: Tamizul Haque, *Human Rights in Islam vis-a-vis Universal Declaration of Human Rights of the United Nations* (Washington D.C.: The World Peace through Law Center, 1981), pp.19-20; S.H.Nasr, *supra*, n.49; A.B.Sajoo, *supra*, n.47; International Commission of Jurists, *Human Rights in Islam* (Geneva: ICJ, 1982).

From the Western viewpoint, Donnelly observed that the Islamic legal doctrine did not provide rights held by persons but duties of rulers and individuals. He notes that:

> Although Moslems are regularly and forcefully enjoined to treat their fellow men with respect and dignity, the bases for these injunctions are not human rights but divine commands which establish only duties.[54]

Despite the emphasis on "human dignity" in Islam, the author concluded that "it is in no way equivalent to a concern for, or recognition of, human rights".[55]

Majid Khadduri lists five rights held by men according to Islam: the rights to personal safety, respect for personal reputation, equality, brotherhood, and justice.[56] He claims that human rights in Islam are "the privilege of Allah (God)", and are "the privilege only of persons of full legal status. A person with full legal capacity is a living human being of mature age, free, and of Moslem faith"[57] - thus denying "personality" and rights to non-Moslems.

---

[52]. Nasr, *supra*, n.49.

[53]. Haque, *supra*, n.51.

[54]. Donnelly, *supra*, n.42, p.306.

[55]. *Ibid.*, p.307.

[56]. Khadduri, "Human Rights in Islam"(1946), 243 The Annals of American Academy and Political and Social Science, pp.77-78. Donnelly poses a scepticism on these alleged rights because of the shortage of evidence supporting them. See Donnelly, *supra*, n.42, p.307.

For Moslems, freedom does not mean individualism, for their whole aim is to integrate the individual into the universal order.[58] This notion leads to the general recognition that Islamic doctrine's emphasis on the welfare of the *ummah* (community) may limit the scope of individual liberty. Since ultimate sovereignty for the Muslim is vested in God, beyond state power, "human rights" are seen as means - not ends as regarded in the West - of harmonizing human relations in a complex and universal world.[59]

b. Traditional African perspective

Human dignity as conceived in traditional African societies shares certain characteristics with the Islamic conception,[60] where the realization of human dignity is via the fulfilment of one's obligations to the group or community.

Josiah A.M.Cobbah asserts in his essay about the African human rights perspective that "the pursuit of human dignity is not concerned with vindicating the right of the individual against the world.... The starting point is not the individual but the whole group including the living and the dead."[61] Similarly, focusing upon the relationship between the person and society, commentators suggest that human dignity existed in "the inner (moral) nature and worth of the human person and his or her proper (political) relations with society."[62]

---

[57] Khadduri, *supra*, n.56.

[58] Nasr, *supra*, n.49.

[59] Sajoo, *supra*, n.47.

[60] Adamous N.Njoya mentions a historical response of Africans regarding Christianity and Islam as follow:

> Christianity, although pure in essence, appeared during the colonial era to be the religion of the dominator, a prop to a policy of inequality, and representative of political power. Islam was different. Those who had brought it had left and the African converts to it interpreted it in their own way, while maintaining their traditional values.

Njoya, "African Concept" in UNESCO, *International Dimension of Humanitarian Law* (Paris: Martinus Nijhoff Publishers, 1988), p.9.

In traditional African societies every individual's role is predetermined and this is conceived of as one's "own privilege",[63] in the group (family, kinship group or tribe). The fulfilment of one's social role renders dignity to the person as a member of the group, thus "to assert their human rights as individuals would be unthinkable and would undercut their dignity as group members."[64] In sum, rights or privileges of the person are assigned on the basis of communal membership, family, status or achievement.

c. Traditional Asian Perspective

In Asia, the strong influence of oriental religions and philosophies (i.e., Buddhism, Hinduism and Confucianism) has led their traditional cultures to perceptions of human values different from those of Western cultures. The following observation will outline three cultural traditions: India, China and Japan.

---

[61]. Cobbah, "African Values and Human Rights Debate: An African Perspective"(1987), 9 Human Rights Quarterly, p.320.

[62]. Rhoda E.Howard and Jack Donnelly, "Human Dignity, Human Rights, and Political Regimes"(1986), 80 American Political Science Review, p.802.

[63]. Cobbah, *supra*, n.61, p.323.

[64]. Rhoda E.Howard, "Group versus Individual Identity in the African Debate on Human Rights" in Adbullahi A.AnNaim and Francis M.Deng ed., *Human Rights in Africa* (Washington D.C.: The Brookings Institution, 1990), p.166.

(1) Hindu India

Traditional Hindu India is one of the most striking examples contrasting with Western liberal democracy. In the Indian caste system,[65] persons are divided strictly according to their relative positions in the hierarchy. Despite such system, a number of writers argue that the concept of "human rights" exists in the traditional Hindu India. Yougindra Khushalani claims that "Hindu civilization had a well-developed system which guaranteed both the civil and political as well as the economic, social and cultural rights of the human being."[66] S.K.Saksena speaks of "Hinduism, with its basic principle of equality of opportunity" and argues that prefeudal Indian society was based on "standards of equality and on the freedom of the individual as an individual."[67] Speaking of India's "traditional, multidimensional views of human rights," Ralph Buultjens discusses human rights implications in Indian political culture:

---

[65]. According to Louis Dumont, the caste system:

> divides the whole society into a large number of hereditary groups, distinguished from one another and connected by three characteristics: "separation" in matters of marriage and contact, whether direct or indirect (food); "division" of labour, each group having, in theory or by tradition, a profession from which their members can depart only within certain limits; and finally "hierarchy", which ranks the groups as relatively superior or inferior to one another.

Dumont, *Homo Hierarchicus: The Caste System and Its Implications* (Chicago: University Chicago Press, 1980), p.21.

[66]. Khushalani, "Human Rights in Asia and Africa"(1983), 4 Human Rights Law Journal, p.408.

[67]. Saksena, "The Individual in Social Thought and Practice" in Charles A.Moore ed., *The Indian Mind: Essentials of Indian Philosophy and Culture* (Honolulu: University of Hawaii Press, 1967), p.367, pp.360-61.

> The caste system produced group solidarity and collective group obligations, an interdependence between groups, and a sense of deference to authority. The essential feature of caste was the assumption that there are fundamental and unchangeable differences in both the status and nature of human beings. These differences make it necessary for people to be governed by different norms of behaviour appropriate to their station in life.[68]

In Hindu society, human dignity or human worth are perceived not as part of the enjoyment of human rights as in Western concepts but in the fulfilment of social duties accompanied with a respective hierarchical status; wherein people's duties and rights are almost completely defined by birth and "specified not in terms of their humanity but in terms of specific caste, age and sex."[69] The proper fulfilment of one's caste obligations (in accordance with the words in *The Laws of Manu*: "Better to do your own duty badly than another's duty well."[70]) is conceived of as bringing reward in the next life,[71] while giving one a place in "a cosmic order"[72] in society. In doing so, it is possible to gain a certain personal or "a sort of contextual"[73] dignity. Given these traditional Hindu ideas, human rights based on individualism are seen as "a moral outrage" or "an affront" to the natural order and social justice.[74]

---

[68] Buultjens, "Human Rights in Indian Political Culture" in Kenneth W.Thompson ed., *The Moral Imperatives of Human Rights: A World Survey* (Washington: University Press of America, 1980), pp.112-13.

[69] Kana Mitra, "Human Rights in Hinduism"(1982), 19 Journal of Ecumenical Studies, p.79.

[70] Buultjens, *supra*, n.68, p.112.

[71] According to the Hindu theory of reincarnation, placement in the caste system being by birth is "all determined by his past conduct and behaviour." Satischandra Chatterjee, *The Fundamental of Hinduism: A Philosophical Study* (Calcutta: Das Gupta and Company, 1950), p.78.

[72] Buultjens, *supra*, n.68, p.111.

[73] Donnelly, *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 1989), p.131.

(2) Chinese Perspective

China has for a long time maintained its distinctive value system emphasizing morality in human relations. Peter K.Y.Woo contends that the Western idea of human rights has never been widely accepted in China because it is rooted in a metaphysical concept foreign to traditional Chinese culture.[75]

The traditional values in Chinese culture are derived mainly from Buddhism, Taoism and Confucianism. The supreme value described as the state of universal unity and harmony of all-being, consisted of the combination of these three philosophical elements: the universal benevolence of Buddhism; the ideal of the compassionate man of Confucianism; and the Taoistic ideal of natural harmony. In this traditional culture there existed no idea of individuals as a subject of rights. Woo suggests that:

> In view of the acceptance of the universal unity and harmony, the issue of individual rights among men did not take the shape of a problem, nor did any form of struggling for rights become recognized as a legitimate activity.[76]

In this value system, the goal of self-realization was achieved not by obtaining personal advantages but via concern for the welfare of other members of the family or community. This line of thinking naturally emphasizes the morality of harmonious relationship in human society.

---

[74]. *Ibid.*, p.135.

[75]. Woo, "A Metaphysical Approach to Human Rights from a Chinese Point of View" in Rosenbaum ed., *supra*, n.49, pp.113-124.

[76]. *Ibid.*, p.115.

This has played a crucial role in Chinese philosophical thought even in modern times. In the process of Westernization of China, notwithstanding that the Western concept of individual rights was adopted to some extent, it was ultimately rejected.[77] In Woo's words the Chinese saw this western concept as "the free reign of the empirical ego."[78]

In this society human dignity, or the goal of self-realization of the person, lies in the moral aspiration to become a contributor to social unity and harmony, whereby one can ascend to the highest human status.

(3) "*Bushido*" in Japan

Bushido is a historical, cultural and moral heritage of the Japanese, which developed since early feudal times (twelfth century). Inazo Nitobe defines it as "the unwritten code of laws governing the lives of the nobles of Japan, equivalent in many ways to the European chivalry."[79] Since the nobles known as "Bushi" (warriors) - a special class with great honour and privileges - had larger societal responsibilities than those equivalent in Europe, Bushido had much broader implications than the

---

[77] The Westernization of China, as seen in the May Fourth movement (1919), at first renounced the Confucian tradition. Later, however, it brought an anti-Christian movement (1922). In this transition, the people inclined toward atheism. See Kun-yu Woo, "The Anti-Christian Movement of Chinese Students in 1922"(1973), 15 The South Asia Journal of Technology, pp.57-69.

[78] Woo, *supra*, n.75, p.121. See also, *ibid*.

[79] Inazo Nitobe, *Bushido: The Soul of Japan* (Rutland, Vermont and Tokyo: Charles E.Tuttle Company, 1969), p.ix.

European chivalry, extending a code of conduct for all aspects of daily life.[80] In terms of its philosophical foundation, Bushido was derived mainly from "*Shinto*",[81] Confucianism and Buddhism. These notions constituted the doctrines of Bushido,[82] which had a profound influence on the mind of the ruling class in Japan.

Several doctrines of Bushido have been identified by writers,[83] though, from the viewpoint of human rights (or human dignity), the following four elements are essentials present in all forms. The first is courage, which is deeply rooted in honour and exercised in the cause of righteousness.[84] The second is humanity which is derived from love, tolerance, affection, sympathy and compassion. "*Bushi-no-nasake*" - the tenderness of warriors - is a typical phrase expressing the humanity and integrity of Bushi whose mercy is based on "due regard to justice."[85] The novel by Bakin Takizawa,[86] *Nanso-satomi Hakkenden* (1814) (Eight Dogs), appeared before Henry Dunant's "A Memory of Solferino"(1862)[87] and already described the established custom under Bushido of giving medical treatment to enemy wounded.[88] The third is honour which does not stem from a position as a ruling class but from the discharge of one's duty. The sense of honour provides "a vivid consciousness of personal dignity and worth" to the Bushi who were "born and bred to value the duties and privileges of their profession."[89] The fourth is the duty of loyalty which obligates one to harmonize with one's superior and nurture group solidarity. Under this political notion implicating self-sacrifice, "Bushido considers that an individual is always part of the nation, and that the national precedes the individual."[90] This is antithetical to the concept of the "inalienable rights of man," which is based on individualism.

---

[80] Sumio Adachi, "The Asian Concept" in UNESCO ed., *supra*, n.60, pp.14-15.

[81] Shinto is a religion according to which the Japanese people view the goddess *Amaterasu-Ominokami* as a common ancestress.

[82] Confucianism was first introduced to Japan about 285 A.D. and Buddhism about 560 A.D. Both ideas were incorporated into the Japanese heritage of humanity, dedication, self-sacrifice and tranquillity. Adachi, *supra*, n.80, p.15.

[83] Nitobe counted justice, courage, benevolence, politeness, veracity and sincerity, honour, and the duty of loyalty. *supra*, n.79. See also Adachi, *supra*, n.80.

[84] Nitobe, *supra*, n.79, p.29.

[85] *Ibid.*, p.42.

[86] See e.g., L.M.Zolbrod, *Takizawa Bakin* (New York: Twayne Publishers, 1967).

[87] By inspiring the movement of the Red Cross, Dunant's writing gave birth to international humanitarian law. See *infra*, Chapter II, International Humanitarian Law, pp.61-62.

The culmination of Bushido was seen, paradoxically enough, at the end of the feudal era (the late nineteenth century), when the Tokugawa Shogunate voluntarily closed the feudal system in 1868[91] and subsequently the Meiji government set out to modernize Japan in a short period by importing Western legal and political concepts.[92]

---

[88]. Nitobe, *supra*, n.79, p.46.

[89]. *Ibid.*, p.72.

[90]. Adachi, *supra*, n.80, p.15.

[91]. Arnold J.Toynbee keenly observed the spirit of Bushido in full bloom at the time of the Meiji restoration:

> at the opening of the next chapter of Japanese history, [feudal daimyos and their henchmen of samurai] rose to a height of self-abnegation which is almost sublime, when they voluntarily divested themselves of their privileges because they were convinced that this sacrifice was required of them in order to enable Japan to hold her own in the environment of a Western World from which she could not no longer hold aloof.

Toynbee, *A Study of History* I (London: Oxford University Press, 1947: Abridgement of Volume I-IV by D.C.Somervell), pp.372-3.

While having an influence via the "glory of elite" upon the nobles, Bushido also penetrated into the other social classes by giving aspiration and inspiration to the nation as a whole:

> although the populace could not attain the moral height of those loftier souls, yet *Yamato Damashii*, the Soul of Japan, ultimately came to express the *Volksgeist* of the Island Realm.[93]

Although at the time of World War II, its traditional notions were distorted by arbitrary ideologies inspired by imperialism, Bushido has remained. The emphasis on a public rather than a private moral sense appeals to the mind of the entire Japanese nation. Bushido has been handed down from generation to generation as a cultural asset as well as a code of conduct.

d. Concluding Observations

In terms of a cross-cultural perspective which tends to regard human rights (or privileges) as a mechanism of realizing human dignity, "human rights" may be expanded to include the various concepts of human dignity in each cultural context. In this respect, Bassam Tibi observes the tendency of non-Westerners to confuse human rights with human dignity, by saying:

---

[92] Nitobe noted that the spring of action, which had brought a rapid change in Japan by her own initiatives, was "no other than Bushido." He attributed the spring to "the sense of honour,"

> which can not bear being looked down upon as an inferior power, - that was the strongest of motives. Pecuniary or industrial considerations were awakened later in the process of transformation.

Supra, n.79, p.175.

[93] *Ibid.*, p.164.

> if one is talking about [human dignity], there exists no doubt that fully developed notions of human dignity exist in many non-Western countries, in Islamic and African countries, as well as Buddhist and other nonmonotheistic cultures.[94]

Many Western scholars, while conceding that certain human values underlie the concept of human rights, stress the need to make a distinction between the moral standard of human dignity, which all cultures share, and specific human rights that are institutionally enforceable and implementable.[95]

However, the fact is that in some non-Western societies, traditional African in particular, there is no clear-cut line between religious values, moral precepts and law. These societies have their own institutions and enforcement mechanisms that enable people to enjoy their rights, or privileges, and to fulfill their obligations, for the benefit of both the community and the individual.

It is not the aim of this thesis to assess the relative merits of Western or non-Western cultural approaches to human rights. With a view to discussing "international" human rights which seek internationally acceptable values, a certain conceptual framework must be laid.

According to Article 38 (1)(c) of the Statute of the International Court of Justice, the World Court may apply when necessary "the general principles of law recognized by civilized nations"[96] as one of the sources of international law. Lauterpacht contended that certain rights of individuals on the international plane, being fundamental claims inherent in man by reason of his very existence, constituted the general principles of law recognized by all civilized nations. He suggested that:

---

[94]. Tibi, "The European Tradition of Human Rights and the Culture of Islam" in An-Naim and Deng ed., *supra*, n.64, p.109.

[95]. E.g., Donnelly emphasizes this distinction because it "should not only clarify what is at stake but should improve the general level of discussion and perhaps even improve political practice." Donnelly, *supra*, n.42, p.315.

> the proper view... is that international law grants [certain] rights to the individual as such - be he an alien, a national, or stateless person... these are fundamental rights of the individual in the international sphere, irrespective of nationality, although some of them may for the time being exist as imperfect rights because of the absence of legal machinery to enforce them.[97]

L.C.Green suggests that "human rights, [while] amount[ing] to *principles of law generally recognized* by civilized nations, do not normally amount to *general principles recognized* by civilized nations"[98](emphasis added). Should the latter principles be regarded as "the moral standard of human dignity", his suggestion might give an indication of how to solve the disputable relationship between human rights and human dignity. In addition, he notes that "[human rights] international law is to outline the manner in which one or two of these rights have developed."[99]

"Internationally recognized" human rights have indeed historically developed in the framework of Western-orientation.[100] This fact on the one hand characterizes international human rights as "only one of a number of cultural influences on the development of international human rights standards,"[101] "a modern cultural achievement in Europe,"[102] or "reflecting [Western] Christian traditions and their libertarian political beliefs."[103] On the other hand, it shows historical attempts and efforts to elevate human rights issues to the international level under the rule of law. Brownlie observes that via the clause "the general principles of law recognized by civilized nations" in Article 38 (1)(c) of the Statute, international tribunals have intended to make international law "a viable system for application in a judicial process" by abstracting "elements from better developed systems," e.g., logical reasoning, private law analogies and domestic laws.[104] Individual judges of the World Court have on occasion maintained that human rights and fundamental freedoms constitute general principles of law recognized by civilized nations. For example, in *South West Africa Cases* Judge Tanaka in his dissenting opinion said:

---

[96] Article 38 (1)(c) reads,

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (c) the general principles of law recognized by civilized nations.

[97] Lauterpacht, *International Law: Collected Papers I* (London: Cambridge University Press, 1970), pp.297-8.

[98] Green, *Law and Society* (New York: Oceana Publication Inc., 1975), p.307.

[99] *Ibid.*

> In the case of the international protection of human rights... what is involved is... the recognition of the judicial validity of a similar legal fact without any distinction as between the municipal and international

---

[100] Details will be reviewed in the next Chapter.

[101] Virginia A.Leary, "The Effect of Western Perspective on International Human Rights" in An-Naim and Deng ed., *supra*, n.64, p.30.

[102] Tibi, *supra*, n.94.

[103] Green, *supra*, n.98, p.300.

[104] Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 4th ed., 1990), pp.15-17.

> legal sphere.... [T]he same human rights must be recognized, respected and protected everywhere man goes.... This is of nature *jus naturale* in Roman law.... The principle of the protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from *universal human nature*.... Provisions of the constitutions of some countries characterize fundamental human rights and freedoms as 'inalienable', 'sacred', 'eternal', "inviolate', etc. Therefore, the guarantee of fundamental human rights and freedoms possesses a super-constitutional significance[105] (emphasis added).

Given the essential international validity of human rights, one can not ignore the core value stemming from "universal human nature" inherent in human existence. The above conceptual frame must be kept in mind for the following discussion of contemporary issues of international human rights.

B. DISTINGUISHING HUMAN RIGHTS CRITERIA

Given the fact that human rights are a product of history[106] and tend to reflect various customs, cultures and religions, such rights are interpreted and respected within each social and cultural context. However, with respect to the international protection of human rights, it is necessary to recognize and to legitimize the universal applicability of certain human rights. Questions arise: What shall be international human rights norms?[107]; which rights are more important than others?. In answering these questions, the substantive content of human rights is classified on the basis of relative weight and importance of fundamental claims and others. The making of such classification is likely to have political implications.

---

[105]. *South West Africa Case* [1966] ICJ Reports 6, pp.296-300. Similar comments were given by Judge Morrelli, in concurring opinion, and Judge Riphagen, in dissenting opinion, in the *Barcelona Transaction Case*. See [1970] ICJ Reports 3, p.232, and pp.337-8.

[106]. Henkin, *supra*, n.22, p.3; Weston, *supra*, n.8, p.16; T.van Boven, "Distinguishing Criteria of Human Rights" in Karel Vasak, *The International Dimension of Human Rights* (Connecticut: Greenwood Press, 1982), p.49.

In order to discuss the nature and relation of these categories of human rights, this paper shall rely upon two well-known distinguishing criteria: "Three Generations of Human Rights" and "Individual Rights and Collective Rights".

1. Three Generations of Human Rights

The concept of "three generations of human rights", advocated by the French jurist Karel Vasak, postulates three categories of rights: (1) The first generation of political and civil rights; (2) the second generation of economic, social, and cultural rights; and (3) the third generation of newly called solidarity rights.

"First generation rights" stem primarily from the seventeenth and eighteenth centuries' liberal tradition as found in the western democracies, resulting from and inspired by the revolutionary declarations in America and France. Based on the philosophy of liberal individualism and the doctrine of laissez-faire, this category emphasizes respect for the freedom of the individual from the State whereby the

---

[107]. In response to the proliferation of human rights instruments, which tend to be seen as a 'catalog' of human rights, some scholars look for a hierarchy of international human rights norms, whereby certain legal norms and values may merit absolute protection in the international community. For example, by assessing the practical significance of his approach, Theodor Meron attempts to establish the status of certain human rights as part of customary international law. T.Meron, "On a Hierarchy of International Human Rights"(1986), 80 American Journal of International law, pp.1-23. See also Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1989). For discussion of human rights as international customary law and *jus cogens*, see *infra*, Chapter II, pp.73-5.

State was obliged not to intervene in the areas of individual security and freedom. These rights have by and large an individualistic character.[108] The core value in the first generation conception is the notion that the liberty of the individual should be secured against the abuse and misuse of political authority.

The second generation of economic, social and cultural rights derives primarily from the social tradition which stresses the State function of promoting economic and social well-being. Historically, it emerged as a counterpoint to the first generation rights. Responding to the unequal social phenomenon caused by the doctrine of laissez-faire and the abuse of individual liberties, this distinctive group of rights requires the intervention of the State for the benefit of all persons, assuring equitable participation in the production and distribution of the values involved.[109] The fundamental value in the "second generation rights" is social equality which necessitates positive State action in the allocation of resources.

The third generation of solidarity rights has been claimed mainly by the Third World countries. This category is understood as a product of the post-colonial era which represents the emergence of Third World nationalism. This category of rights, primarily focusing upon the economic development of those countries, has been observed as the reconceptualization of value demands associated with the two earlier generations of human rights.[110]

---

[108] Articles 6-27 of the International Covenant on Civil and Political Rights set forth such rights, see *infra*, Chapter II, p.76, n.108.

[109] Such rights are illustrated in Articles 6-13, 15 of the International Covenant on Economic, Social and Cultural Rights, see *infra*, Chapter II, p.76, n.110.

The "third generation rights" can be explained from two motivational standpoints. One is the demand for a global redistribution of power, wealth based on certain important values: (1) the right to political, economic, social and cultural self-determination; (2) the right to economic and social development; and (3) the right to participate in and benefit from "the common heritage of mankind".[111] The other motive is to put an emphasis upon the new role of the nation-state in certain critical respect: (1) the right to peace; (2) the right to a healthy and balanced environment; and (3) the right to humanitarian disaster relief.[112] This stance is asserted on the basis of Article 28 of the U.D.H.R., which proclaims that "everyone is entitled to a social and international order in which the rights set forth in this Declaration can be fully realized."

This new generation of rights, being a counterpoint to "individual rights", tends to be considered as collective rights. Thus, a comparative discussion of this category will be mainly made in the following setting: "individual rights" and "collective rights".[113]

---

[110] Weston, *supra*, n.8, p.18.

[111] The common heritage of mankind includes Earth-space resources; scientific, technical, and other information and progress; and cultural traditions, sites and movements, *ibid*.

[112] *Ibid*.

[113] See *infra*, at 35.

a. Priority and legitimacy

The manifestation of three distinctive categories of rights poses a question of whether each group of rights is equally acceptable or whether one is to be preferred to the others.

First generation proponents are inclined to exclude second-generation rights from their definition of human rights. Derived from natural rights doctrine, this category presupposes the absence rather than the presence of governments in the characterization of human rights. The proponents insist that this group is distinguishable from the promotional nature of the other,[114] which necessitates positive action by the State. Conversely, second generation defenders tend to regard the first generation rights as insufficiently attentive to human social needs. Moreover, they criticize such rights as instruments to legitimize an unjust capitalistic social order.

This exclusive approach leads to an ideological debate which seeks to legitimize some socio-political system. This kind of ideological approach would end up with, in the words of David Sidorsky, "semantic battles", which have been observed in the debate over the term "democracy" between Eastern and Western Europe in the aftermath of World War II.[115]

---

[114] See *infra*, Chapter II, pp.76-7.

[115] At that time, the term "democracy" was contested between the new governments of Eastern Europe, which defined themselves as popular democracies, and Western Europe, which asserted democracies based on a pluralistic model. Sidorsky observes that "human rights has become the most recent of a series of terms over which semantic battles are waged in order to legitimize competing political and social attitudes." Sidorsky, "Contemporary Reinterpretations of the Concept of Human Rights" in Sidorsky ed., *Essays on Human Rights: Contemporary Issues and Jewish Perspectives* (Philadelphia: Jewish Publication Society of America, 1979), p.89.

There exists an interdependence between "civil rights" and "social rights",[116] with trade union rights as a case in point. Trade union rights, on the one hand, clearly have economic and social aspects, which include the right to work and the enjoyment of just and favourable conditions of work, the right to an adequate standard of living, and the right to rest and leisure. On the other hand, such rights contain civil and political elements, for example, the right to freedom of peaceful assembly and association.[117]

In modern society, the function of the State is changing considerably, compared with the time of "freedom from" the State. "Civil rights" may be infringed by non-State entities which have economic, technological, or spiritual potentials (e.g., private companies or new cults). In light of the State's obligation to maintain public order and security within its jurisdiction, the State has a duty to guarantee civil and political rights against the intrusion by non-State elements. Given this enlarged function of the State with respect to the protection of human rights, "the difference between 'social rights' and 'civil rights' is in the process of disappearing."[118]

In addition, it is noteworthy that the unity of "civil rights" and "social rights" has been increasingly stressed in U.N. human rights documents. In accordance with the idea recognized by the Proclamation of Teheran of 1968,[119] the U.N. General Assembly, in its resolution 32/130 of 1977, declared, regarding the concept of human rights:

---

[116] Some of the first generation rights require affirmative government action. Those are the rights to security of the person, to a fair and public trial, to asylum from persecution, and to free election. Conversely, the second generation rights include those requiring no action and no impediment imposed by State, such as the right to free choice of employment, and the right freely to participate in the cultural life in the community.

[117] See e.g., G.Caire, *Freedom of Association and Economic Development* (Geneva: ILO, 1977); C.W.Jenks, *International Protection of Trade Union Freedoms* (London: Stevens, 1957).

[118] van Boven, *supra*, n.106, p.49.

> (b) The full realization of civil and political rights without enjoyment of economic, social, and cultural rights is impossible; the achievement of lasting process in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.

In view of the growing recognition of the inter-relation between "civil rights" and "social rights", there is no reason to decide whether or not one category of rights is more important than the other. Different categories of rights are equally valid and fulfilling the core value of human being, viz., "the full realization of the human personality".[120]

2. Individual Rights and Collective Rights

Collective rights, still a term of obscurity, are called "solidarity rights", "rights of people" or "communal rights".[121] This category of rights has been regarded as the antithesis of individual rights: "The Western emphasis on individual rights vis-a-vis the State has resulted by and large in ignoring the entire question of communal rights."[122] The Third World countries and "minorities"[123] being the main protagonists of collective rights have respectively advocated their legal status in human rights instruments.

---

[119] Final Act of the International Conference on Human Rights at Teheran. See U.N., *Human Rights: A Compilation of International Instruments* (New York: U.N. Publication, 1988), ST/HR/1/Rev.3, pp.43-46.

[120] Robertson, *supra*, n.2, p.14; van Boven, *supra*, n.106, p.49. Gewirth's view, that economic and social rights must be considered human rights even if they do not meet the tests of universality and practicability, is consistent with Robertson's assertion. A.Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978). Cranston opposes this stance, see *supra*, n.1, p.65.

[121] Douglas Sanders, "Collective Rights"(1991), 13 Human Rights Quarterly, p.368.

From the Third World perspective, the third generation of human rights, as indicated above, tends to be seen as collective rights. Being primarily focused upon the right to development, this category covers a broad range of rights, from the right to self-determination to the right to peace.[124] As a result of the colonial experience of economic exploitation, credence is given to the notion of human dignity as consisting of economic rights rather than civil and political rights.[125]

As far as the State has a responsibility to realize the human rights, or alleged

---

[122]. Pollis and Schwab, *supra*, n.43, p.17.

[123]. With reference to several definitions of minorities made by scholars and U.N. organs, Bart Driessen defines a minority nation as "a (part of) nation, the number of which make up a perceived minority in a particular state, which is not dominant in that state, and the members of which are not also generally members of the dominant nation in that state." Driessen, *A Concept of Nation in International Law* (The Hague: T.M.C. Asser Institut, 1992), p.18.

[124]. van Boven enumerates collective rights as the right of peoples to self-determination, the right of under-privileged peoples and groups of persons to a fair and equitable share in the world's resources, the right of radically discriminated groups to equality before the law, the right to development and the right to peace. *Supra*, n.106, p.55.

[125]. Pollis and Schwab introduce three claims as such economic rights: freedom from starvation; the right for all to enjoy the material benefits of developed countries; and freedom from exploitation of colonial powers. *Supra*, n.43, p.9.

With regard to the maintenance of the welfare of all nations, mutual assistance among nations was advocated by Vattel, a proponent of natural law, over two centuries ago. He recognized such assistance as an obligation common to all members (i.e., Nations) of natural society:

> The general law of [natural] society is that each member should assist the others in all their needs, as far as he can do so without neglecting his duties to himself.... The end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be regarded as so many free persons living together in a state of nature, are bound mutually to advance this human society.

Le Droit des Gens (1758) Intro. s.10, 12, (Carnegie tr.: Oxford Clarendon Press, 1916), pp.5-6.

"human dignity", of its people, this realization is naturally associated with the State's policy of freeing its people from colonial exploitation so as to attain economic betterment. Thus, economic development is regarded as the highest priority in the State's policy. For these countries, the individual's right to civil and political participation is "a luxury"[126] which ought to be treated as part of long term goals that would be achieved through progressive transformation of the socio-economic system.

Due to the ambiguous definition and motive of collective rights, such rights have been sharply criticized by theorists.[127] Regarding the "luxury" contention, the fact showed the unexpected result that economic progress in those countries has been likely to be accompanied by authoritarian regimes, whereby such regime has increasingly repressed civil and political rights.[128] Given the vague notion of collectivities which could be translated as the State, history has shown that this category of rights undeniably has an inherent risk of undermining, or sacrificing the rights of individuals.[129]

---

[126] The "luxury" contention is based on the idea that the achievement of economic and social rights is a pre-condition for civil and political rights, for until economic and social rights are realized, a State is not in the condition to provide civil and political rights.

[127] Writers described collective rights as "objectives of social policy", "distortion of the ordinary meaning of human rights" or the recourse to accept "the rights of the State". See Robertson, *supra*, n.2, pp.258-259; Shestack, *supra*, n.38, pp.99-101; and J.Humphrey, *No Distant Millennium: The International Law of Human Rights* (Paris: UNESCO, 1989), pp.22-23.

[128] David Trubek observes that "[i]n the past ten years it has become clear that rapid economic growth in Third World countries is often accompanied by increasing resort to repression by authoritarian regimes which are fundamentally opposed to the ideals of the Universal Declaration and the standards of the Political Covenant." Trubek, "Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs" in Theodor Meron ed., *supra*, n.38, p.225.

The rights of minorities, in van Boven's word collective rights "par excellence", have sought their own place in the collective rights approach to international legal norms.

Under the United Nations system, the rights of minorities have been dealt with through the principle of non-discrimination which is referred to in the Charter of the United Nations and the International Bill of Human Rights.[130] Among them, the most contentious provision regarding the rights of minorities is Article 27 of the Covenant on Civil and Political Rights, which reads:

> In those States in which ethnic, religious or linguistic minorities exist, *persons belonging to such minorities* shall not be denied the rights, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language (emphasis added).

The discussion of the intentions of this article is beyond the scope of this thesis.[131] In view of the words "persons belonging to such minorities," it suffices to say that Article 27 does not seem to give a high profile to the protection of the rights of a group.[132] The original orientation and outlook in the U.N. was in the direction of the rights of the individual, the rights of groups are not sufficiently addressed.[133] Under these circumstances, the protection of the rights of minorities must rest upon the recourse of protecting the right of the individuals who "belong to such minorities".

---

[129] In particular given the traditional cultures of Third World countries that the individual is conceived as an integral part of a "group", where the collective rights notion contains an everpresent danger of the denial of individual rights. See James C.N.Paul, "Participatory Approaches to Human Rights in Sub-Saharan Africa" in An-Naim and Deng ed., *supra*, n.64, pp.213-243.

[130] The International Bill of Human Rights consists of the Universal Declaration of Human Rights (1948), two International Covenants (1966), and the Optional Protocol to the International Covenant on Civil and Political Rights. The principle of non-discrimination is referred to in the Charter of the U.N. (Art.1 (3)), U.D.H.R. (Art. 2 (1)) and the Covenant on Civil and Political Rights (Art. 2 (1) and 26, 27). For the text of U.N. human rights instruments, see Brownlie, *supra*, n.44.

[131] For the debate over this issue, see e.g., Natan Lerner, *Group Rights and Discrimination in International Law* (Boston: Martinus Nijoff Publishers, 1991), pp.15-16.

Proponents of collective rights tend to seek support for the right to self-determination in the first article of the two International Covenants.[134] The word "peoples" in the articles, being an ambiguous and undefined notion, has led to scepticism of the approach of relying upon these provisions as a basis for collective rights. For example, John Humphrey argues that "undefinable groups like 'people'...

---

[132] The recent ruling of the U.N. Human Rights Committee (on March 31, 1993), relating to Quebec policy restricting English in outdoor commercial advertising, sees this issue from a linguistic point of view. The Human Rights Committee concluded that most restrictions on commercial advertising violate the fundamental right to freedom of expression that all governments in Canada are under international obligation to uphold. It denied the claim of anglophone Quebecers as a linguistic minority, arguing that anglophones constitute a majority in Canada. This ruling allegedly gives impetus to easing the language restriction policy in Quebec where Bill 178 now under review bans English signs. See "Quebec Considers Eliminating Sign Restrictions" *The [Toronto] Globe and Mail* (23 April 1993) A3.

[133] The San Francisco Conference which established the U.N. in 1945 was organized by the West while the Third World countries were still under colonial rule. The original foundation of the U.N. thus inevitably reflected Western liberalism pursuing individual rights. Under the League of Nations, however, there existed an elaborate system to protect the rights of certain European minorities. See e.g., L.C.Green, "Protection of Minorities in the League of Nations and the United Nations" in A. Gotlieb ed., *Human Rights, Federalism and Minorities* (Lindsey/Ontario: John Deyell Ltd., 1970), pp.180-210.

[134] The article, which is generally understood as a collective right clause, says:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The right to self-determination has been well-exercised in the decolonization movement under the aegis of the United Nations.

may have no legal status even in national law".[135]

However, Leslie Green critically observes that the general scepticism about collective rights tends to overlook duties to communities:

> Collective rights are not as favourably regarded simply because many people endorse first-order normative views according to which the interests of individual people are of over-riding importance and that individuals should not bear duties for the sake of collectivities.[136]

In addition, it has been suggested that with the growing influence of the Third World States, the U.N. human rights approach has shifted its emphasis from individual rights to collective rights.[137] Lerner observes that a more broad and flexible perspective forms the basis of the modern approach in the U.N. bodies as a whole. He notes:

---

[135] Humphrey, *supra*, n.127, p.22. Yoran Dinstein, a proponent of collective rights, explained the difficulty of defining "people" in comparison with "nation":

> It is not fortuitous that one of the most controversial - and politically explosive - questions in the life of the State of Israel has been, "Who is a Jew?" rather than "Who is an Israeli?" Patently, there is no acid technical test which would enable us to determine whether a cluster of human beings constitutes a people.

Dinstein, "Collective Human Rights of Peoples and Minorities" (1976), 25 International and Comparative Law Quarterly, p.104.

In this regard, the term "community" was defined by the Permanent Court of International Justice, in its advisory opinion in the *Greco-Bulgarian Communities* (1930):

> By tradition... the 'community' is a group of persons living in a given country or locality, having a race, religion, language and tradition of their own and united by this identity of race, religion, language and tradition in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the sprit and tradition of their race and rendering mutual assistance to each other.

P.C.I.J., Ser.B. No.17, p.21.

[136] Green, "Two Views of Collective Rights"(1991), 4 Canadian Journal of Law and Jurisprudence, p. 315.

[137] The evolution of the U.N. approach is traceable in some documents, e.g. Final Act of International Conference on Human Rights (The Proclamation of Teheran of 1968), UN Sales No.E.68 XIV. 2; General Assembly Resolution 32/130 in 1977; UN Doc. E/CN.4/988; UN Doc. E/CN.4/1334(1979); General Assembly Resolution 34/46 in 1979. T.van Boven values this change as "at the global level, a most striking development in the two decades". *Supra*, n.106, p.57.

> What is significant in the modern approach is the transition from the paternalistic notion of protection to a more general notion of rights inherent to the condition of some specific and well defined groups, together with the search of a system based on the harmonization of the rights of the State, the individual and the group.[138]

In addition to these institutional trends, ethnocentric tensions currently emerging in the northern hemisphere have led legal and political scholars to search for a new approach to the notion of collective rights.[139] Given the fact that devastating conflicts based on ethnicity threaten to cause, or actually cause, massive denials of human rights, "it is too late to protest that only individual people are actually recognized as having rights."[140]

The reappraisal trend on both institutional and theoretical levels reflects the growing awareness that the Western liberal-and individual-oriented human rights regime is no longer sufficient to meet the human rights issues of today.

a. Concluding Observation

At this point, it will be useful to discuss certain contextual arguments relating to individual and collective rights. Both types of rights co-exist under principles proclaimed in the U.D.H.R. The rationale for this can be found in Article 29 of the Declaration which also provides some indications of future approaches. Paragraph 1 of the article states that "Everyone has duties to the community in which alone the free and full development of his personality is possible." Rights are claimable on the ground of "duty". In fulfilling their duty, individuals have a right to develop fully their personality within the community, whereby they can gain "social recognition as one of the key human values."[141] Likewise, the right of collectivity naturally entails the duty of the State or the community to secure life for its members.

---

[138] *Supra*, n.131, p.17. One of these trends is found in the 1978 UNESCO Declaration on Race and Racial Prejudice, which is regarded as "a comprehensive statement based on the multi-disciplinary trend aimed at covering the different aspects involved in the problems of the race and group-relations." *Ibid*. For this text, see the U.N., *supra*, n.119, at 135.

[139] For example, Kluwer Academic Publishers (Netherland) has published periodically the 'International Journal on Group Rights' since 1992. See e.g., L.C.Green, "Group Rights, War Crimes and Crime against Humanity"(1993), 2 International Journal on Group Rights, pp.27-56; Douglas Sanders, *supra*, n.121. See also "Collective Rights"(1991), 4 Canadian Journal of Law and Jurisprudence, pp.217-419.

[140] Green, *supra*, n.136.

Paragraph 2 of the same article reads:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public, order and the general welfare in a democratic society.[142]

The basic idea is that a person can enjoy rights and freedoms with due regard for the rights of others and the community as a whole. Respect for other individuals, being an essential element of modern democracy, indicates due recognition for the unique and diverse character of every human person. Thus, democracy accommodates many different ways of thinking of human rights within the pluralistic society.

---

[141]. A.Belden Field and Wolf-Dieter Narr point out four key human values:(1) freedom; (2) social recognition; (3) equality; and (4) integrity, in the conceptualization of human rights. Field and Narr, "Human Rights as a Holistic Concept"(1992), 14 Human Rights Quarterly, pp.1-20.

[142]. The term "the general welfare in a democratic society" in the U.D.H.R. is vague when contrasted with the relatively specific "in a democratic society... for the protection of health and morals, or for the protection of the rights and freedoms of others" in Article 8, 9, 10 and 11 of the European Convention on Human Rights. For this comparison, see Bayefsky, *International Human Rights Law* (Toronto/Vancouver: Butterworth, 1991), pp.161-73. It is also interesting to compare Section 1 of the Canadian Charter of Rights and Freedoms: "demonstrably justified in a free and democratic society." For the texts, European Convention, see e.g., Brownlie, *supra*, n.44; The Canadian Charter, see e.g., *Canadian Charter of Rights and Freedoms: Annotated* (Aurora, Ontario: Canada Law Books, 1982).

Based upon these principles, two points can be suggested regarding the contextual argument of the two categories of rights. First, the principle of rights grounding duties to the community provides protection against peremptory and self-interested concerns (as part of political and ideological debate) for a certain group of rights which would eventually diminish respect for human being. As Nobel laureate and political dissident Andrei Sakharov wrote from his internal exile in the Soviet Union:

> The ideology of human rights is probably the only one which can be combined with such diverse ideologies as communism, social democracy, religion, technocracy... it can also serve as a foothold for those... who have tired of the abundance of ideologies, none of which have brought... simple human happiness.[143]

Some critics point out that this kind of perspective will lose political credibility even among its own proponents. Mackie, an advocate of individual rights, is wary of a defensive tendency to protect the interest of the individual, stating that:

> It may be asked whether this theory is individualist, perhaps too individualist. It is indeed individualist in that individual persons are the primary bearers of the rights, and the sole bearers of the fundamental rights, and one of its chief merits is that, unlike aggregate goal-based theories, it offers a persistent defence of some interests of each individual.[144]

In addition, as part of the recognition of the pluralistic order in the world community, attention is given to mutual respect between individual rights and collective rights while seeking a certain balance between them. On the one hand, individualism can no longer mitigate the grave situation on the collective level, e.g., a widening imbalance of production and distribution of basic values between North and South, and the emerging conflicts between ethnic and religious groups. These problems are threatening the basic needs of human life and even the very existence of certain groups of people.[145] On the other hand, collective rights legitimizing authoritarian regimes is clearly beyond the balance between these two categories of rights.

---

[143] As quoted in Burn H.Weston, "Human Rights"(1984), 6 Human Rights Quarterly, p.281.

[144] J.L.Mackie, "Can There be a Right-Based Moral Theory?" in J.Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984), p.179.

In order to mitigate the conflict between individual and collective rights, emphasis should be put upon tolerance so that the one would concede and even promote certain aspects of the other category.[146] In the present formative stage of collective rights norm-making, these principles enumerated in Article 29 of the U.D.H.R. should be fully taken into account for the sake of furthering well-balanced concepts of human rights.

---

[145] For example, the civil war currently being fought in Bosnia-Herzegovina (part of the former Yugoslavia) among three ethnic groups (viz., Croatians, Serbs and Muslims) has seen manifest a systematic "ethnic cleansing," which intends to terminate Bosnian Muslims. The mass slaughter of Bosnian Muslims is expanding to Muslim towns and villages, where the people are "threatened with extinction." *Time* (26 April 1993), p.16. The rights of minorities are becoming an imperative issue of human rights in the 1990s as observed by U.S. Secretary Warren Christopher: "The world's response to the violence in the former Yugoslavia is an early and crucial test of how it will address the concerns of ethnic and religious minorities in the post-cold war world." *News Week* (26 April 1993), p.37.

[146] In his recent writing relating to the protection of group rights, L.C.Green professes a further respect for the rights of groups which might entail certain burdens on the peoples of the world. Green, *supra*, n.139, p.56.

CHAPTER II

INTERNATIONAL HUMAN RIGHTS AND NGOs: HISTORICAL SURVEY

A. Pre-World War II

Under traditional international law, the individual was regarded as an object (not a subject); namely, he/she was unable to enjoy rights and share duties in his/her personal capacity.[1] For instance, Oppenheim, the leading authority on international law in the United Kingdom, wrote that:

> the so-called rights of mankind... do not in fact enjoy any guarantee whatever from the Law of Nations, and they can not enjoy such guarantee, since the Law of Nations is a law between States, and since individuals can not be subjects of this law.[2]

Thus, matters concerning inhabitants in a State were under the discretion of the ruler, or in more current terms, under the domestic jurisdiction of the State. However, with regard to aliens abroad, "customary international law"[3] has long imposed on States a responsibility to treat aliens in accordance with "the minimum standard of international law."[4]

---

[1] L.C.Green, *Law and Society* (Dobbs Ferry, New York: Oceana Publications, Inc., 1975), p.241.

[2] L.Oppenheim, *International Law: A Treatise* (London: Longman Green and Co., 1905), p.346. However, Lauterpacht as his editor modified this stance after the fifth edition (1937), recognizing the limitation of the principle that States are only subject of international law:

> although States are the normal subjects of International Law, they may treat individuals and other persons as endowed directly with international rights and duties and constitute them to that extent subject of International Law.

E.g., (8th ed., 1955), s.13a, pp.19-20.

[3] Article 38 I.(2) of the Statute of the International Court of Justice refers to international custom, as one of the sources of international law, that the Court shall apply, saying that "international custom, [should be regarded] as evidence of a general principle accepted as law." J.L.Brierly defines international custom as "what is sought for is a general recognition among states of a certain practice as obligation." *The Law of Nations* (Oxford: Clarendon Press, 6th ed., 1963), p.61.

1. The Protection of Aliens

The obligations with respect to aliens were originally claimed on a religious basis, framed by the doctrine of natural law. In his work *De Indis Noviter Inventis* (1532), Francisco de Vitoria, Spanish theologian advocating natural law, maintained that Spaniards had the right to reside among the Indies "provided they do no harm to the natives, and the natives may not prevent them."[5] He also professed that the right to trade with the Indians was justifiable in accordance with the principle of "righteousness and charity."[6] Furthermore, his natural law theory was intended to defend the "inalienable" rights of the Indians.

Since the Age of Mercantilism, with the expansion of their commercial activities, Western countries were faced with the need of protecting the interests of their nationals abroad. The powerful States initiated bilateral treaties which specify protection of their nationals. As a result, States were under an obligation to observe a certain minimum standard in the treatment of aliens residing in their territories. The idea that one's own nationals must receive "civilized treatment" abroad eventually evolved into "the minimum standard of international law for the treatment of aliens."[7] Such State practice constituted international custom wherby States are obliged not to deny "justice to aliens."[8]

---

[4] See e.g., Andreas H.Roth, *The Minimum Standards of International Law Applied to Aliens* (Leyden: Sijthoff, 1949).

[5] S.3, para.386 (J.B.Scott, *The Spanish Origin of International Law, Part I, Francisco de Vitoria and his Law of Nations* (Oxford: Clarendon Press, 1934), App.A, XXXVI).

[6] Vitoria sought a rationale of such rights on the religious ground that "if the Spaniards kept off the French from trade with Spaniards, and this not for the good of Spain, but in order to prevent the French from sharing in some advantage, that practice would offend against righteousness and charity." *Ibid.*, para.390 (App.A, XXXVIII).

Any failure by a host State to observe these standards, with resulting damage to an alien, made that State liable to pay compensation. In this case, the right to claim compensation from the host State did not belong to the injured individual, but to the State whose nationality the person bore. Under this system, the decision to bring such a claim is at the discretion of the State of which the injured alien is a national. In case the alien is stateless, there is thus no recourse for him to take.[9]

2. The Abolition of Slavery

The humanitarian movement to combat slavery began in Great Britain, with pressure being exerted by the Quakers and the Anti-Slavery Society. Slavery had been illegal in England ever since *Somersett's case*[10] in 1772, in which it was held that a slave brought by his master from Jamaica to England must be freed on an order of *habeas corpus* whatever the law might be in Jamaica.[11] This decision did not, however, stop the slavery trade, which continued until 1811 when participation in the trade became a criminal offence under English law.[12]

---

[7]. By this international custom, aliens were entitled to receive, in Green's words, "the bare modicum of civilized rights." He illustrates such standards as follows:

> By and large, those rights are tantamount to what western European civilization regards as the minimum conditions of the rule of law: the right to trial, the right to receive a fair hearing and to be heard in one's own defence, being defended by counsel of one's own choice, with the limits laid down by the local authority regulating the conditions under which persons are allowed to appear before the courts.

Green, *supra*, n.1, p.243. See also C.F.Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford: Clarendon Press, 1967).

[8]. See Henkin, *The Rights of Man Today* (Colorado: Westview Press, 1978), p.90. In the name of justice to aliens, powerful countries have often used "capitulation agreements" wherein the "sending State" was given exclusive jurisdiction over offenses committed by its nationals. Furthermore, States insisted on an international standard of justice (rooted in natural law) for their nationals abroad even if these States themselves might not necessarily recognize this standard for their nationals at home. *Ibid.*

[9]. However, some measure for the protection of stateless persons is given by the Convention relating to the Status of Stateless Persons, 360 *United Nations Treaty Series* (1960), at 117; U.N., *Human Rights: A Compilation of International Instruments* (New York: U.N. Publications, 1988), St/HR/1/Rev.3.

In the nineteenth century, a number of treaties came into force for the abolition of slavery and the slave trade. In the Treaty of Paris (1814) the British and French Governments agreed to cooperate in the suppression of the slave trade. This undertaking led to the Congress of Vienna (1815) in which eight European Powers signed a "Declaration Relative to the Universal Abolition of the Slave Trade".[13] A series of treaties was concluded between 1814 and 1880, though none of them was particularly effective. Even though the attempt was made to give teeth to the earlier arrangements by vesting a reciprocal right to visit and search to the naval vessels of the Contracting Powers, most of them were formally abrogated or recognized as obsolete.[14]

---

[10] *Somersett* v. *Stewart*, 20 *State Trials*, at 1.

[11] *Ibid*.

[12] Parliament passed an *Act* in 1811 making slave trade a felony. Another Act was passed in 1824, declaring slave trade to be a form of piracy and thus a capital crime. In *the Le Louis* (1817), 2 Dods. 210, however, Lord Stowell insisted that the national legislation describing slave trade as piracy was not sufficient to make this offence piracy *jure gentium*.

[13] For the text of this Declaration, see E.Hertslet, *Map of Europe by Treaty* (Farnborough: Gregg International Pub., 1969), Vol.II, No.7, p.60.

[14] Typical instances were the Treaty of London (1841) and the Treaty of Washington (1862). See C.W.W.Greenidge, *Slavery* (London: George Allen and Unwin Ltd., 1958), Chapter XIV.

At the Berlin Conference on Central Africa in 1885, seventeen States agreed to ban the slave trade in the territories of the Congo basin.[15] Further improvement was undertaken at the Brussels conference which set forth an anti-slavery Act (1890)[16] ratified by eighteen States. In addition to the recognition of reciprocal rights of search and capture, the Act of Brussels provided for the establishment of two special offices to assist in the implementation of its provisions: the International Maritime Office in Zanzibar and an International Bureau in Brussels. This Institution was one of earliest examples of international measures of implementation.[17]

These undertakings concerning the abolition of the slave trade were taken over by the League of Nations. Provisions relating to slavery were included in the League Covenant, but applied only to the mandated territories.[18] In 1924 a Temporary Slavery Commission of Experts was founded and in 1932 an Advisory Committee of Experts on Slavery. Those organs made substantial progress in the institutional approach to this issue, as they were entitled to intervene in the domestic affairs of a country.[19]

---

[15] For the Berlin Act, see 10 Martens, N.R.G., 2nd Series, at 414.

[16] 17 Martens, N.R.G. 2nd Series, at 345.

[17] A.H.Robertson, *Human Rights in the World* (New York: Manchester University Press, 1989), p.15.

[18] Article 22 of the League Covenant declared that the development of the peoples in the mandated territories should form a "sacred trust of civilization" and that the mandatory powers should administer the territories under conditions "which will guarantee freedom of conscience and religion... and prohibition of abuses such as the slave trade."

[19] When Ethiopia applied for membership of the League, the Committee did substantial work investigating the situation of slavery and the slave trade in Ethiopia. Based upon accumulated information, the League accepted the application from Ethiopia under the condition that the Ethiopian government undertook to abolish slavery and slave trade within a fixed period. This formally recognized

Under the auspices of the League of Nations, the International Slavery Convention of 1926[20] was concluded with the intention of "securing the complete suppression of slavery in all its forms and of the slave trade by land and sea."[21] However, it still had the major defect of lacking provisions for its implementation.[22] The term "slavery in its all forms", being so vague and questionable, was supplied with a more specific indication in the Supplementary Convention on Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.[23] Moreover, with regard to the slave trade, Article 3, 2(a) obligates the State Parties to take all effective measures to punish persons engaged in the slave trade. The abolition of slavery and the slave trade is one of the leading examples of progress through conventions in the international protection of human rights.

---

that the question was not a purely internal one but one in which the League had the right to intervene and to receive any information necessary. F.P.Walters, *A History of the League of Nations* (London: Oxford University Press, 1952), p.258.

[20] For the text, U.N., *supra*, n.9, at 153.

[21] *Ibid.*, Preamble.

[22] The 1926 Convention was amended in 1953 by a protocol under the aegis of the United Nations in which the powers and duties were succeeded by the Secretary-General.

[23] Article 7 of the 1956 Supplementary Convention defines the terms relating to slavery as follow:

> (a) "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all the powers attaining to the rights of ownership are exercised, and "slave" means a person in such a condition or status;
>
> (b) "A person in servile status" means a person in a condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention.

a. The Anti-Slavery Society

The Anti-Slavery Society, which is the oldest NGO in the field of human rights,[24] had played an important role in abolishing slavery. The Society was established in 1783, originally with the aim of disseminating information about the plight of slaves from Africa. Nevertheless, the historical role played by the Society has been highly valued and it is said that the achievements of the 1880s, which produced numerous international conventions suppressing slavery in Africa, were largely due to activities by the Society.[25]

In tracing the Society's activities, one finds an original pattern of how human rights NGOs institutionalize their activities on the international level. This pattern can be illustrated in the following seven stages.

In the first stage, a number of individuals sharing the same goal form a voluntary organized group in one country: Quakers established the Anti-Slavery Society in England.

In the second, the group expands its membership within the framework of the original purpose, while approaching influential figures, e.g., scholars, politicians and group organizers: The Society brought out a pamphlet, *The Case of our Fellow Creatures, The Oppressed Africans*, and sent a copy to each member of Parliament.

---

[24]. Stosic remarks that "it is a fact that the first known NGOs were created in Protestant countries with national churches," citing the establishment of the British and Foreign Anti-Slavery Society. Borko D.Stosic, *Les Organisations non Gouvernementales et les Nations Unies* (Geneva: Librairie Droz, 1964), pp.24-25, as quoted by Pei-heng Chiang, *Non-Governmental Organizations at the United Nations: Identity, Role, and Function* (New York: Praeger Publishers, 1981), p.20.

[25]. Peter Archer, "Action by Unofficial Organizations on Human Rights" in Evan Luard ed., *International Protection of Human Rights* (London: Thames and Hudson, 1967), p.162.

Another instrument is the *Anti-Slavery Reporter* published since 1823.

Third, efforts are made to appeal to and mould public opinion: Thomas Clarkson, a member of the Society, remarked that "between May 1787 and July 1788 the Society held fifty-one meetings and printed and distributed no less than 51,430 pamphlets and books, besides 26,526 reports, accounts of debates in Parliament and other small papers."[26]

Fourth, the group attempts to gain support from those who formulate government policy: the Society gained support from Wilberforce and Buxton, members of Parliament, who helped the Society's campaign in Parliament and played an instrumental role in securing passage of the Bill abolishing slavery in 1834.

Fifth, the group having fulfilled its domestic target to some extent seeks similar activists or groups in other countries so that they can work together at the international level: in finding the same interests in the abolitionist movement in the United States, the Society members corresponded with numerous American groups opposing slavery.

Sixth, as the domestic aim is achieved with the support of national legislative and administrative organs, the group persuades its government to hold international conventions on the subject: in 1840 the Society held a Convention in London under the auspices of the British government. The convention was attended by delegates from all over the world.

Seventh, at the international convention the groups inform and expertise governmental delegates and persuade the government to accept agreements: the convention in London (1840) paved the way for the Society to persuade the governments of the European Powers to conclude the Treaty of London (1841). The Society helped to bring about the Brussels Conference of 1890, which led to the Brussels Act of 1890.

---

[26]. Greenidge, *supra*, n.14, p.160.

By this final stage, the NGO has by and large grown enough to influence certain aspect of governmental policies. The NGO, while maintaining interaction between grass roots activities and international undertakings, plays a crucial role in putting pressure on governments. In addition to its contribution to the abolition of slavery, the role played by the Anti-Slavery Society is of historical importance in showing subsequent human rights NGOs a prototype of international legislation by governments through the pressure of NGOs.

3. The Protection of Minorities

The protection of minorities is one of the oldest concerns in international law and its history dates back to the thirteenth century.[27] A large movement arose in the sixteenth century, aimed at safeguarding dissident religious groups following the Protestant reformation. The Treaty of Augsburg (1555)[28] set out the principle *cujus regio, ejus religio* which was primarily intended to ensure the equality of Catholic and

---

[27]. The protective treaty to a specific minority group is found in the promise in 1250 by St. Louis of France to the members of the Maronite community to protect them as if they were French subjects. See Patrick Thornberry, "Is There a Phoenix in the Ashes? - International Law and Minority Rights"(1980), 15 Texas International Law Journal, p.426.

[28]. Dumont, *4 Corps Universal Diplomatique du Droit des Gens* (1726), part 3, pp.88-93.

Protestant princes in the Free Cities of the Holy Roman Empire. In confirming this principle, the Treaty of Westphalia (1648)[29] (between France, the Holy Roman Empire, and their respective allies) provided safeguards for minorities, though the protection was applied incompletely. The principle of religious freedom and equality consequently emerged on the international sphere while forming a basis of the conventional law of Europe.[30]

In the nineteenth century, the principle of religious freedom had been periodically confirmed on a treaty basis in Europe. For instance, at the Congress of Vienna in 1815[31] European powers set out the constitution of the German Federation stipulating that "difference between the Christian religions should cause no difference in the enjoyment by their adherents of civil and political rights."[32] Such a principle was also adopted at the Congress for the Treaty of Berlin (1878).[33]

After the Congress of Vienna, the emphasis in treaties shifted from religious to national minorities.[34] This trend, as regards States containing "alien" minority elements, led to protection treaties "in a more secular style."[35] The protection of minorities, while implying the coexistence of national and religious elements, developed into multilateral instruments. Such secularized practice also indicated the political inspiration of the great powers to expand their spheres of influence. As Inis Claude has observed, "[f]or the most part, minority obligations had been imposed only upon states which were small and weak, and which were considered somewhat backward and illiberal."[36] The movement of "minorities protection" expanded beyond the newly created Balkan states to the Far East, where "Japan and China were forced to make concessions on the practice of the Christian religion."[37]

---

[29] Parry, *Consolidated Treaty Series*, Vol.1, p.119.

[30] H.Wheaton, *History of the Law of Nations in Europe and America* (New York: Gould, Banks and Co., 1845), p.71, cited by L.C.Green "Protection of Minorities in the League of Nations and the United Nations" in Allan Gotlieb ed., *Human Rights, Federalism and Minorities* (Lindsay/ Ontario: John Deyell Limited, 1969), p.181. For instance, the Treaty of Nijmegen (1678), the Treaty of Ryswich(1697), both the agreement between France and Holland, and the Peace Treaty between France and Great Britain (1713) contained provisions to respect the religious freedom of their nationals. Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), p.28.

[31] Martens, *2 Nouveau Recueil* (1818), at 379. See also Rie, "The Origin of Public Law and the Congress of Vienna"(1951), 36 Grotius Transactions, at 209.

[32] Leo Gross, "The Peace of Westphalia, 1648-1948"(1948), 42 American Journal of International Law, pp.22-23. Those powers (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain, and Sweden/Norway) also confirmed the rights of Jews: "the German Diet should consider the grant of civil rights to Jews on condition that they assume all civic duties incumbent on other citizens." *Ibid*.

[33] *69 British and Foreign State Papers* (1877-8), at 749.

Such a treaty system had a shortcoming in its implementation; there was no effective machinery to supervise the infringement of minority provisions. This system contained a potential danger to international peace in that unilateral intervention may be induced in the internal affairs of States on the ground of not only religious freedom but also national and political interests.[38]

---

[34] Article IV of the Treaty of Berlin of 1878, for instance, provided in relation to Bulgaria that "[i]n the districts where Bulgarians are intermixed with Turkish, Romanian, Greek or other populations, the rights and interests of those populations shall be taken into consideration as regards the elections and the drawing up of the Organic Law of the Principality." Hurst, *Key Treaties of the Great Powers* Vol.2 (Newton Abbot: David and Charles, 1972), at 551.

[35] Thornberry, *supra*, n.30, p.29.

[36] Claude, *National Minorities* (Cambridge: Harvard University Press, 1955), p.7. Similarly, Thornberry notes that "obligations [to respect minorities] were imposed on some States, indicating a second-class citizenship." *Supra*, n.30, p.30.

[37] Thornberry, *supra*, n.27, p.427. For instance, the Treaty of Tientsin of 1858, between Great Britain and China, contained provision for religious toleration in China. Article VIII stated that:

> The Christian religion, as professed by Protestants or Roman Catholics, inculcates the practice of virtue, and teaches man to do as he would be done by. Persons teaching or professing it, therefore, shall alike be entitled to the protection of the Chinese authorities, nor shall any such, peaceably pursuing their calling, and not offending against the law, be persecuted and interfered with.

Hurst, *supra*, n.34, Vol.1, at 343.

In the aftermath of World War I, the redrawing of borders on the European continent brought about "new minorities" within each State's territory. The complex problem of minorities produced many treaties[39] as an essential part of the peace settlement.[40]

The League of Nations set up an elaborate machinery to supervise the established treaty system. When violation of a State's obligations was alleged, minority groups could bring their complaints before the League. Once the Secretary-General considered the case admissible, an *ad hoc* Minorities Committee, appointed by the Council, would investigate the matter and try to reach a friendly settlement. If the attempt at settlement failed, the complaint was referred to the full Council. The Council could also refer the dispute to the Permanent Court of International Justice. Under the guarantee of the League of Nations, the minorities provisions were characterized as "obligations of international concern", and could not be modified without the consent of the Council of the League.

---

[38] The international rights of humanitarian intervention based on religious grounds had been approved by Grotius. See *De Jure Belli ac Pacis* (1625), Lib.II, cap.XX, (Carnegie tr. by Kelsey, 1025). However, numerous interventions in the 19th century, as observed by L.C.Green, were motivated "by a secularisation of the fundamentals of religious belief." He also discusses the political reality of such intervention:

> Despite the fact that Christian states claimed the right to intervene in the affairs of others when Christians were persecuted, the so-called international right of humanitarian intervention tends to be nothing but an ideological excuse to enable a more powerful State to interfere in the affairs of a weaker State. It was easier to deal with Turkey as 'the sick man of Europe' than it was to do anything effective against Czarist Russia or Nazi Germany. By the twentieth century, little was heard of this right of humanitarian intervention.

Green, *supra*, n.1, p.291, p.243. For this issue, see e.g., Natalini Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Ground of Humanity* (Dordrecht: Martinus Nijoff Publishers, 1985); C.Adler and A.M.Margalith, *With Firmness in the Right: American Diplomatic Action Affecting Jews 1849-1945* (New York: Arno Press, 1946).

[39] On issues of these treaties, see e.g., Thornberry, *supra*, n.30, pp.38-44.

[40] Lloyd George's Memoir manifests urgent concerns regarding minority issues at that time:

> It was recognized very early in the course of the Peace Conference, that the question of the protection of minority population in the Succession States was one of paramount importance. There was common agreement amongst all the parties concerned that assurances for the protection of these minorities must be given as one of the essential conditions of a peace settlement. Apart form the inherent justice of such a provision, we foresaw trouble in the future if any of these minorities were ill-treated.

George, *The Truth about the Peace Treaties* (London: V.Gollancz, 1938), p.1362.

4. The League of Nations

World War I exposed the defects of traditional inter-state relations, often described as "the Old Diplomacy".[41] With the establishment of the League of Nations the main concern was to remedy these defects by providing machinery which would prevent and remove the political causes of war. The Covenant of the League of Nations of 1919 had no provision about human rights.[42]

This does not mean that human rights matters had not been raised during the drafting of the Covenant. At the Peace Conference of Paris in 1919, delegates discussed the matter of including some provisions for minority protection in the League Covenant. In the discussion of draft article 21, President Wilson first attempted to put forward the principle of minority protection with the aim of protecting freedom of religion. The Japanese delegate Baron Makino immediately set forth a counter proposal to add a clause establishing national and racial equalities.[43]

---

[41]. See A.Zimmern, *The League of Nations and the Rule of Law 1918-1935* (New York: Russell and Russell, 1969), Chapter I, pp.13-22.

[42]. Nevertheless, Article 22 and 23 included some references to human rights: Article 22 referred to the obligation of mandatories to administer dependent territories based on the principle that "well being and development of such peoples form a sacred trust of civilization"; and Article 23 provided that the member States were to undertake to secure "fair and humane condition of labour" and "just treatment" of indigenous inhabitants of dependent territories.

The Japanese amendment was not approved, whereupon the Japanese delegate proposed the insertion of such a provision in the Preamble of the Covenant. This proposal obtained majority support at the commission level, though "the proposal so frightened some countries which restricted Asian immigration"[44] that both proposals from the United States and Japan were dropped.[45]

According to Shigejiro Tabata, the Japanese proposal was not inspired by a human rights perspective but rather intended to address the unfair and discriminatory treatment of Japanese immigrants in the United States and Australia.[46] In addition, in view of the fact that the whole session was preoccupied with the idea of human rights issues falling within the exclusive domestic jurisdiction of the State, eventually reserved in Article 15 (8) of the Covenant,[47] the political and legal climates at the time were not yet mature enough to accept the international protection of human rights. As a result, no obligation regarding human rights was incorporated into the Covenant.[48]

---

[43]. Baron Makino's statement:

> The equality of nations being a basic principle of the League of Nations, the High Contracting Parties agree to accord, as soon as possible, to all alien nationals of States members of the League, equal and just treatment in every respect, making no distinction, either in law or fact, on account of their race or nationality.

David H.Miller, *The Drafting of the Covenant* (New York: Johnson Reprint, 1969), Vol.2, p.324.

[44]. John Humphrey, *No Distant Milennium: The International Law of Human Rights* (Paris: UNESCO, 1989), p.38.

[45]. For the details of the drafting process of the provisions, see Miller, *supra*, n.43, pp.323-325, pp.392-394.

[46]. Tabata, *Internationalization of Human Rights (Kokusaikajidai-no-Jinkenmondai)* (Tokyo: Iwanami-shoten, 1988), p.11.

Despite the defect of no human rights articulation in the Covenant, the League got positively involved in the field of human rights. Its involvement extended to the status of women, prostitution, freedom of information, the protection of refugees, and, as previously observed, the abolition of the slave trade and the protection of minorities.

5. International Labour Legislation

The movement toward international labour legislation began in the late nineteenth century; based not on a human rights perspective but rather on economic grounds. There was fear that the improvement of labour conditions would raise the price of goods to consumers so that domestic trade and prosperity would be affected adversely by a flood of cheaper foreign goods into the market. Thus, the advanced industrial states were faced with a dilemma forcing them to balance the requirements of national labour legislation against sustainable economic competitiveness in the international market. In dealing with this conflict, they sought to protect domestic economic interests by setting up international agreements which standardized labour conditions based upon standards in the industrialized countries.[49] As a result, at diplomatic conferences in Berne in 1906 and 1913,[50] four multi-lateral conventions were concluded.[51]

---

[47]. The British government, which took a leading role in the discussions, has frequently emphasized that involvement by the Drafting Committee in this racial question would encroach on state sovereignty. Miller, *supra*, n.43, p.389.

[48]. Warwick A.Mckean concluded in his paper about this drafting, saying: "it was regrettable that no provision on the question, or on religious or on racial equality, was included in the Covenant." McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983), pp.14-19.

The International Labour Organization (I.L.O.), established by the Treaty of Versailles in 1919, succeeded the earlier undertakings and took the initiative to promote labour standards onto the international plane. One of the innovations which the I.L.O. introduced was the "tripartite character" of State delegations, i.e., the delegation was to consist of representatives not only of governments but also of employers and workers. The I.L.O.'s relative success in the implementation of its conventions is partly due to this balanced cooperation of governments, management and labour.[52]

---

[49] See e.g., C.W.Jenks, *Law, Freedom and Welfare* (London: Stevens and Sons, 1963), p.110. A primary concern re: "fair international competition" in international legislation is observed in the subsequent discussion regarding international trade agreements:

> the claim for protection against competition from the products of low standard labour is a recurrent and important political reality, which, as recent discussions in GATT of protection against market disruption and the emphasis placed on greater uniformity of social policy in the Common Market evidence, presses no less insistently upon statesmanship in 1963 than it did in 1919.

Ibid.

[50] The International Association of Labour Legislation, a non-governmental organization, played a leading role in convening these conferences. The Association was established in 1900 by governmental initiatives and received financial support from interested governments. It had fundamental problems promoting international agreements on industrial questions. First, it had no representatives from government, employers or workers. Its members consisted of professors, doctors, lawyers and social workers who were not directly involved in industry. Second, in its investigations into industrial questions the Association could not command the necessary information so that its reports tended to be one-sided, inaccurate and incomplete.

Despite these problems, the Association was of use in the establishment of the I.L.O. Moreover, the Conventions initiated by the Association were regarded as the forerunners of many conventions adopted in later year by the I.L.O. G.A.Johnston, *The International Labour Organization* (London: Europa Publications, 1970) pp.9-10.

[51] The Conventions concerned the prohibition of night work and limitations on the working day for women (now condemned as "paternalistic" by feminists) and young persons, and the prohibition of the use of white phosphorus in industry. *Ibid.*

With regard to standard-setting, the I.L.O. adopted six Conventions and six Recommendations at the first session of the International Labour Conference in 1919. These covered a wide range of problems, including the eight-hour working day and forty eight-hour work week, unemployment, maternity protection in industry and commerce, night work by women and young persons, and the minimum age for employment in industry. By the end of 1992, the number of Conventions adopted by the I.L.O. amounted to 173.[53]

6. International Humanitarian Law

Another important branch of international law, humanitarian law, began to develop in the middle of the nineteenth century. Henry Dunant, a Swiss citizen who was moved by the tragedy of the Solferino battlefield (the war between Italy and Austria in the middle 1860s), made a two-fold proposal: (1) to establish a volunteer relief society to assist the army's medical service in the event of war; (2) to adopt an international principle to provide a legal basis for the protection of military hospitals and medical personnel. The first proposal brought about today's Red Cross and Red Crescent movements. The International Committee of the Red Cross (I.C.R.C.),[54] a prestigious NGO founded in 1863, has become the promoter and guardian of humanitarian ideals and has also been instrumental in developing standards of international humanitarian law.[55]

---

[52]. Regarding this relative success, C.W.Jenks found its essence in the role of "non-territorial forces of integration" which is afforded by the tripartite system. Jenks, *International Protection of Trade Union Freedoms* (London: Stevens and Sons, 1957), p.514; see also N.M.Poulantzas, "International Protection of Human Rights: Implementation Procedure within the Framework of the I.L.O."(1972), 25 Revue Hellenique de Droit International, at 110; F.Wolf, "I.L.O. Experience in the Implementation of Human Rights"(1975), 10 Journal of International Law and Economics, at 599.

[53]. The text of each instrument is published in *Labour Law Documents* and *Official Bulletin* by the International Labour Office according to the year of adoption.

a. Historical Traditions

International Humanitarian Law has developed mainly along two branches of legal thinking. One, called the Geneva law, or Red Cross law, focused upon victims of war. The I.C.R.C. tried to secure legislative recognition of its *ad hoc* activity by assisting diplomatic conferences, in order to guarantee humanitarian protection and assistance to the victims. The first work in developing this area is to be found in the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 1864. In subsequent Geneva Conventions designed for the protection of victims of war, the scope was steadily extended: in the 1906 Convention to sick and wounded soldiers; and in the 1929 Convention to prisoners of war. Both instruments were the outcome of a diplomatic conference convened by the Swiss government, supported by the I.C.R.C.'s preparatory arrangement. This tradition developed into the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.

---

[54]. The I.C.R.C., with its seat at Geneva and its membership confined to Swiss nationals, is a private corporation under Swiss law. It is generally regarded as an international NGO because of the scope of its activity and the fact that the I.C.R.C. is recognized in international law (e.g., the right to visit prisoners of war and civilian detainees in Article 126 of Third Geneva Convention of 1949 and in Article 76 and 143 of Fourth Geneva Convention of 1949). Although the I.C.R.C. receives support from Swiss and other interested governments as well as national Red Cross Societies, its activities are relatively independent of governmental policy. See David P.Forsythe, *Humanitarian Politics* (Baltimore/London: John Hopkins University Press, 1977), pp.8-10; "The Red Cross as Transnational Movement: Conserving and Changing the Nation-State System"(1976), 30 International Organization, pp.607-30.

[55]. From 1864 to 1977 nine treaties comprise the conventional law. See D.Schindler and J.Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Boston: Martinus Nijhoff Publishers, 3rd ed., 1988)

The other branch, called the Hague law, primarily focused on the regulation of the conduct of war. This was the outcome of a pragmatic compromise between humanitarian considerations and military necessity, based in part on the notion of the preservation of the State. At the Hague Peace Conferences of 1899 and 1907 fifteen conventions were concluded relating to neutral rights, weapons, methods of warfare, and prisoners of war.[56] The I.C.R.C. was not involved in these diplomatic conferences. Instead, another NGO, the Institut de Droit International,[57] played a significant role in the achievement of these conventions.[58]

---

[56]. For the text of these conventions, see *ibid.*

[57]. The Institut de Droit International (Institute of International Law) was founded in 1873 at Brussels and composed of the leading international lawyers of the world. One of its aims was to promote the progress of international law by "voicing the legal conscience of the civilized world." Archer, *supra*, n.18, p.167. The resolutions adopted by the Institute greatly contributed to the development of international law, with the effect that "an examination of almost any treaties on international law published since the organization of the Institute would show the dependence... upon its resolutions." James B.Scott, *Resolutions of the Institute of International Law: Dealing with the Law of Nations* (New York: Oxford University Press, 1916), p.V. See also L.C.White, *International Non-Governmental Organizations: Their Purposes, Methods, and Accomplishments* (New York: Greenwood Press, 1968), pp.202-4.

[58]. Elihu Root stated before the American Society of International Law:

> ...it is not generally understood that the first conference at the Hague would have been a complete failure if it had not been for the accomplished work of the Institut de Droit International.

Quoted by White, *ibid.*, p.13.

b. Modern Development

The experiences of World War II exposed weaknesses in earlier arrangements concerning humanitarian law. Faced with a "total war" that produced victims among the civilian population by urban bombardment and the systematic extermination of Jews and certain ethnic groups, earlier arrangements were insufficient to secure the life of civilians.

The inhuman conduct during World War II led to the adoption of the four Geneva Conventions of 1949, which attempted to remedy these shortcomings via the extension of subject matter and the improvement of implementation mechanisms. The Fourth Convention, which relates to the protection of civilian persons in time of war, was a new development aimed at protecting civilians in the domestic territory of the enemy and especially protection of "enemy" nationals in occupied territory.

With respect to their implementation mechanism, two innovations were introduced in the four Conventions. One was a monitoring system for securing the services of a Protecting Power and, in default, of substitute organizations such as the I.C.R.C.[59] The other was a system of mandatory penal repression for "grave breaches" of the four Conventions.[60] Each State Party to the Conventions is obliged to bring those charged, regardless of nationality, to trial in their own court to punish them, or alternatively to hand them over for trial to other Parties who hold evidence of their criminality.[61]

---

[59]. Article 8, 9, 10 and 11, common to the four Conventions.

[60]. Article 49, 50, 129 and 146, common to the four Conventions.

The armed conflicts happening under the 1949 Geneva Regime showed the deficiencies of the Geneva Conventions, in particular, with regard to regulating advanced weapons technology and the increasing intensity and scale of fighting in internal armed conflicts.[62] Limited respect for the Conventions led State Parties to freeze the penal enforcement machinery.[63] In order to remedy the gap between the realities of State practice and the humanitarian ideal of protecting civilians, further efforts were required to refine existing humanitarian law.

The U.N. conference on human rights at Teheran in 1968 raised the concern for "human rights in armed conflicts" and concluded with the resolution by the General Assembly which required the U.N. Secretary General to begin study on this issue, together with the I.C.R.C.[64] The I.C.R.C., maintaining its position as legal secretariat to the law, engaged in preparatory work from 1971 to 1973 in which a draft text was produced with the intention of updating and clarifying the Geneva Conventions and modernizing the rules limiting the methods of warfare.

---

[61]. Article 47, 47, 127 and 144, common to the four Conventions.

[62]. Article 3 common to all four Conventions of 1949 set out the rules which apply to "armed conflict not of an international character occurring in the territory of a State Party." In reality, however, due to its defective character, i.e., the uncertain definition of "armed conflict not of an international character" and the lack of any monitoring device in deference to state sovereignty, the provision did not, with a few exceptions, secure its application to the cases of frequent internal armed conflicts.

[63]. G.I.A.D.Draper, "The Development of International Humanitarian Law" in UNESCO ed., *International Dimension of Humanitarian Law* (Paris: Martinus Nijoff Publishers, 1988), p.82.

[64]. Resolution 2442 (XXIII), Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 March 1968, UN Doc. A/CONF.32/41, p.18. From this conference, close links have been established between the advancement of human rights and of humanitarian law. On the issue of this movement - a debate which lies beyond the scope of this paper - see Theodor Meron, *Human Rights in Internal Strife* (Cambridge: Grotius Publication Ltd., 1987), Chap.1; *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989); Yoram Dinstein, "Human Rights in Armed Conflict: International Humanitarian Law" in T.Meron ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), Vol.2, pp.346-347; U.N.,"Human Rights and Humanitarian Law"(1992), 91/1 Bulletin of Human Rights, at 1.

A diplomatic conference in 1974 concluded with the adoption of the two Additional Protocols of 1977 to the Geneva Conventions of 1949.[65] To some extent the Protocols attempted to combine the "Geneva law" focusing on the protection of war victims with the "Hague law" concerning rules of waging war.[66] Consequently, the Geneva Conventions became an integrated institution, composed of the principal sources of international humanitarian law.[67]

Being the primary initiator for an international legislative movement, the I.C.R.C. has succeeded in inspiring a series of international conventions. Based on the recognition that governments, decisive actors in international politics, hold the power of final decision-making, the I.C.R.C. has concentrated its efforts on securing acceptance of its principles by governments and international governmental organizations such as the U.N. The I.C.R.C. is the best example of an NGO which has enjoyed the effective support of governments for its legislative activities, while maintaining a certain distance in terms of humanitarian ideals, to government policies.[68]

---

[65] For the text, see *supra*, n.55.

[66] See Richard J.Erikson, "Protocol I: A Merging of the Hague and Geneva Law of Armed Conflicts"(1979), 19 Virginia Journal of International Law, at 557.

[67] For the question regarding the application and implementation of the two Protocols, see UNESCO, *supra*, n.63, Part III and IV.

[68] While conceding its historical achievement, David Forsythe critically views the "conservative" and "cautious" standard-setting approach by the I.C.R.C.:

> The I.C.R.C... has believed it should operate only with state consent, and the most

B. Post-World War II: Human Rights in the United Nations

World War II revealed many of the shortcomings of the traditional doctrine of international law. Nazi atrocities such as the Holocaust were the ultimate manifestation of unfettered sovereignty, which authorized the State to dispossess and exterminate ethnic groups and minorities, possessing the nationality of the state concerned. These tragedies provided impetus to the movement for reconstructing the nature and order of international law. In formulating this new structure aimed at international peace and security, the protection and promotion of human rights were recognized as essential factors.[69] This prompted a revolutionary change in international legal schools of thought which began to recognize the individual as a "subject" of international law; i.e., a subject of both rights granted and duties imposed via international law.[70]

> realistic way of protecting and assisting individuals is through that approach. Thus its legislative efforts have been designed to modify traditional international law according to humanitarian values, but not challenge that traditional law.

Forsythe, *supra*(Humanitarian Politics), n.54, pp.130-31.

[69]. See e.g., President Roosevelt's *Annual Message to Congress*, H.Doc.1/77 c1/1941; H.Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons Ltd.,1950; reprinted by Connecticut: Archon Books, 1968), pp.111-113. Lauterpacht was one of the most ardent advocates of this idea. According to his philosophy, mainly based on the natural law doctrine, international peace depends not only upon the abolition of war, but also upon the limitation of State sovereignty, accompanied by recognition of the individual as a subject of international law. *Ibid.*

[70]. See e.g., L.C.Green, *International Law: A Canadian Perspective* (Ontario: the Carswell Company Ltd., 2nd ed, 1988), p.91. In the work "The Subjects of the Law of Nations"(1947,48), 63, 64 The Law Quarterly Review, pp.438-60, pp.97-119, Lauterpacht advocated the individual as a "subject" of international law, with reference to "crimes against humanity" as enunciated in the Nuremberg Charter:

> The express enactment of crime against humanity must be regarded as an indirect recognition of fundamental rights of human personality independent of the law of the State and enforceable by international law.

Ibid., 64 The Law Quarterly Review, p.113. For crimes against humanity, see *infra*, p.70, n.83.

1. The Charter of the United Nations

The Charter of the United Nations (hereinafter "the Charter") contains a number of references to the promotion of human rights. Articles 55 and 56 of the Charter contain the most important indications. Article 55 provides that the U.N. shall promote, *inter alia*, "universal respect for, and observance of, human rights of freedom for all without distinctions to race, sex, language or religion". Article 56 says that "all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purpose set forth in Article 55". Other references to human rights are found in the Preamble and other articles.[71]

There has been continuing controversy as to whether the human rights provisions of the Charter create binding legal obligations on the part of member States to respect the human rights of their inhabitants. Those who deny the existence of a legal obligation have insisted that State Parties have no more than a nebulous promotional obligation. According to Josef Kunz, "they constitute no legal norms, but only guiding principles."[72] Similarly, Kelsen expressed the view that:

---

[71] The references in the Charter are, in the Preamble, "We the people..., determine... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women, and of nations large and small"; Article 1 (3), which states the purpose of the UN "to achieve international cooperation... in promoting respect for human rights and for fundamental freedoms for all"; Article 13 authorizes the General Assembly to make studies and recommendations about human rights; Article 62 contains a similar provision about the Economic and Social Council; Article 68 requires the Council to set up Commissions in the economic and social fields and for the promotion of human rights; and Article 76 lists the promotion of human rights and fundamental freedoms for all without distinction among the basic objectives of the trusteeship system.

[72] J.L.Kunz, "The United Nations Declaration of Human Rights"(1949), 43 American Journal of International Law, pp.317-318. He found the reason also in Article 2 (7) of the Charter, where respect for human rights is a matter which is "essentially within the domestic jurisdiction" of any State. The current U.N. approach to this matter will be discussed in Chapter III, pp.131-5.

> [t]he language used by the Charter... does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects.... Legal obligations of the members... can be established only by an amendment of the Charter or by Convention... ratified by the members."[73]

In the case *Sei Fujii* v. *California* (1952) the California Supreme Court held that the Charter provisions on human rights lacked the mandatory quality and definiteness necessary to indicate an intent to create enforceable rights.[74]

In contrast to the school of thought followed in the California Supreme Court ruling, Hersch Lauterpacht contended that the idea of the relevant provisions being a mere declaration of principle devoid of any element of legal obligation was "no more than facile generalization."[75] As far as the member States are under a legal obligation to act in accordance with "the Purposes of the United Nations",[76] "it is their legal duty to respect and observe fundamental human rights and freedoms."[77] Regarding Article 56 he maintained that "[t]here is a distinct element of legal duty" in the way the article is expressed.[78] Similarly, Philip Jessup observed that "it is already law, at least for members of the United Nations, that respect for human dignity and fundamental human rights is obligatory."[79]

---

[73] H.Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (London: Stevens and Sons, 1950), pp.29-32.

[74] *Sei Fujii* v. *California* [1952], 38 Cal.2d 718, 242 P.2d 617. The California District Court of Appeal had ruled invalid a state statute (the *Alien Land Law*) forbidding aliens ineligible for citizenship to "acquire, possess, enjoy, use, cultivate, occupy, and transfer" real property, on the ground that the statute conflicted with the human rights provisions of the U.N. Charter. [1950], 218 P.2d 595 (Cal.Dist.Ct.App.1950). In his comments on this decision, L.C.Green writes that "[i]t is not really the [state] Alien Land Law which is inconsistent with the Charter, but the United States [federal] nationality legislation which introduces the discrimination that the court disliked so much." Green, "Human Rights and Colour Discrimination"(1950), 3 The International Law Quarterly, p.426.

[75] Lauterpacht, *supra*, n.69, pp.147-149.

[76] The purpose of the United Nations are embodied in Article 1 (3) of the Charter. See *supra*, n.71.

[77] Lauterpacht, *supra*, n.69.

Although the Charter repeatedly provides that the U.N. shall seek to encourage and promote respect for human rights and fundamental freedoms, it neither defines the basic human rights and fundamental freedoms nor contains provision for their implementation. With regard to the content of these rights, some preliminary efforts had been made in the Declaration by the U.N. in 1942.[80] In spite of this, at the 1945 drafting Conference of the Charter, the participants did not include the content of such rights in the Charter, assuming there existed a common recognition among them.[81] In view of the legal impetus at the time given by the Nuremberg Charter,[82] the concept of "crimes against humanity"[83] presumably constituted a general recognition of fundamental human rights.[84]

---

[78] Lauterpacht, *ibid*.

[79] Jessup, *A Modern Law of Nations* (New York: Macmillan Co.,1948), p.91. See also Quincy Wright, "National Courts and Human Rights - Fujii Case"(1951), 45 American Journal of International Law, p.70; Georges Scelle, *I.L.C. Yearbook* (1949), p.169; F.Blaine Sloan, "Human Rights, the United Nations and International Law"(1950), Nordisk Tidsskrift for International Ret, Acta scandinavica juris gentium, pp.30-31; and Louis B.Sohn, "The Human Rights Law in the Charter" (1977), 12 Texas International Law Journal, p.131.

[80] The parties declared their conviction:

> that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in their lands, and they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world.

79 *Treaty series* (1942), Cmd.6388 (1942), quoted by L.C.Green, *supra*, n.1, p.298.

[81] Green, *ibid*.

[82] See e.g., Benjamin B.Ferencz, *An International Criminal Court: A Step Toward World Peace - A Documentary and Historical Analysis* (New York: Oceana Publications Inc., 1980), Vol.1, pp.71-6 and pp.453-68.

Given that the Charter lacks a definition of human rights and provision for their implementation, it is difficult to assume that, simply on the basis of its human rights provisions, a legal obligation is imposed upon member States. Nevertheless, member States are obliged to refrain from any action undermining "fundamental human rights and freedoms" (inspired by crimes against humanity) which is clearly incompatible with the purposes of the United Nations.[85] Suffice it to say that the human rights provisions of the Charter amount to a commitment on the part of the member States to cooperate and strive toward the goals set out in the Charter.

2. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights, adopted on 10 December 1948,[86] places a heavy emphasis on traditional political and civil rights and, in addition, includes a number of social and welfare rights. There has been debate over whether or not the Declaration is a set of obligatory standards that signatory States

---

[83] Article 6 of the Charter annexed to the Four Power Agreement of August 8, 1945 reads:

> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.

[84] See Lauterpacht, *supra*, n.69.

[85] Goodrich says in this regard that "it does mean that members are obliged to refrain from obstructionist tactics and to cooperate in good faith to achieve the goals specified in Article 55." L.M.Goodrich et al, *The Charter of the United Nations* (New York: Columbia University Press, 3rd ed, 1969), p.381.

[86] G.A. Res. 217 A. U.N. Doc.A/810, (1948). For the text, see e.g., Brownlie, *Basic Documents of Human Rights* (Oxford: Clarendon Press, 3rd ed, 1992).

must apply.

According to Goodrich, "it was not a treaty and was not intended to impose legal obligation."[87] In the words of Eleanor Roosevelt, who chaired the Commission of Human Rights, the "[Declaration] is not a treaty; it is not an international agreement, it is not and does not purport to be a statement of law or of legal obligation."[88] As observed in the Preamble of the Declaration, it was meant to proclaim "a standard of achievement for all people and all nations" rather than enact legally binding obligations. Further evidence of this is that the document contained no provision for implementation.

Nevertheless, given the fact that the Declaration has formed the basis of numerous U.N. resolutions and conventions concerning human rights,[89] and the judges of the International Court of Justice have on many occasions stressed its formative process of developing into law,[90] the Universal Declaration has now perhaps acquired a status more authoritative than originally intended.[91] Advocates of this school of thinking observe that the Declaration has the status of "moral authority",[92] or constitutes "an authoritative guide,... to the interpretation of the provisions in the Charter."[93] Some authorities assert that it has become binding under customary law[94] and moreover "constitutes... a binding instrument in its own right, representing the consensus of the international community on human rights."[95]

---

[87]. L.M.Goodrich, *The United Nations* (New York: Thomas Y.Crowell, 1959), p.249.

[88]. The United Nations General Assembly, Official Records: Third Session, First Part, Plenary, 180th Meeting (New York), p.860.

[89]. See eg., U.N., *supra*, n.9.

[90]. See e.g., *South West Africa Case* [1966] I.C.J. Report 6, dissenting opinion of Judge Tanaka, PP.294-300; *Barcelona Transaction Case* [1970] I.C.J.Report 3, separate opinion of Judge Morelli, p.232 and dissenting opinion of Judge Riphage, pp.337-8. The majority opinion in the 1966 Case of *South West Africa*, which refused to accept "humanitarian considerations" (i.e., human rights referred to in the U.N. resolutions and declarations) becoming part of international law, was superseded by the Advisory Opinion in the 1971 *South West Africa (Namibia) Case*, in which the court supported the binding force of the Security Council's resolutions on member as well as non-member States. See *South West Africa Case* [1966] I.C.J. Report 6, p.34; [1971] I.C.J. Report 16, pp. 51-54; see also concurring opinion of Judge Ammon, *ibid*., p.76.

According to Article 38.I.(2) of the Statute of the International Court of Justice, customary law can be regarded as binding when the alleged custom shows "evidence of a general practice accepted as law".[96] In view of the practices in non-

---

[91] The Secretary General, in his 1971 Survey of International Law (A/CN.4/245, at 196), pointed out two elements to support this process: "One is the use of the Declaration as a yardstick by which to measure the content and standard of observance of human rights. The other is the reaffirmation of the Declaration and its provisions in a series of other instruments. These two elements, often he found combined, have caused the Declaration to gain a cumulative and persuasive effect". Henkin, *International Law: Cases and Materials* (Minnesota: West Pub. Co., 1980), p.809.

[92] Lauterpacht defined the moral authority as "a function of the degree to which States commit themselves to an effective recognition of these rights guaranteed by a will and an agency other than and superior to their own." *Supra*, n.69, p.419.

[93] Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 4th ed., 1990), pp.570-1.

[94] See Humphrey, *supra*, n.44, p.156; J.L.Brierly, *supra*, n.3, p.59; The 1968 Montreal Statement of the Assembly for Human Rights, a meeting of non-governmental organizations, asserts that "the Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary law." 9 Journal of the International Commission of Jurists (1968), p.95.

[95] Sohn, *supra*, n.79, p.133.

[96] See *supra*, n.3.

Western Countries, e.g., some Third World States,[97] undermining civil and political rights in the name of the right to development[98] and Islamic countries having their own distinctive penal code,[99] it is dubious that there exists a world-wide "general practice" of accepting the Declaration as binding law.[100] This is supported by the fact that there is no expectation of sanction in the event that the Declaration is violated. Thus, "the consensus of the international community on human rights" ought to be found not in the Declaration as a whole but to the limited extent that certain rights became recognized as peremptory obligations on States.[101] Rosalyn Higgins discusses this in the context of *jus cogens*[102]:

---

[97] For instance, one of the delegates from Burma at the 1993 Bangkok Conference on Human Rights, a preliminary meeting among Asian nations toward the 1993 World Conference in Vienna, claimed that "Asian countries, with their own norms and standards of human rights, should not be dictated [to] by a group of other countries who are far distant geographically, politically, economically and socially." "Rights Thinking" *Far Eastern Economic Review* (17 June 1993) p.5.

[98] See e.g., Dunstan M.Wai, "Human Rights in Sub-Saharan Africa" in A.Pollis and P.Schwab ed., *Human Rights: Cultural and Ideological Perspective* (New York: Praeger Publisher, 1979), pp.115-144.

[99] Islamic concepts of punishment, including stoning, crucifixion, mutilation and flogging are all contrary to Western concepts of the rule of law. This is observed in a statement made by the Iranian representative to the Human Rights Committee in 1982: "Our people have decided to remain free, independent and Islamic and not to be fooled by the imperialist myth of human rights." *The [London] Times* (2 June 1986). See also S.Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (Guilford, England: F.J.Goulding, 1970); Frank Newman and David Weissbrodt, *International Human Rights: Law, Policy and Process* (Cincinnati: Anderson Publishing Co., 1990), pp.307-332.

[100] By seeking its causes in State policy (e.g., apartheid) and the influence of local traditions, L.C.Green concludes that the nations of the world do not sufficiently share common ground to accept human rights as universal or general principles of law. Green, *supra*, n.1, p.301, p.307 and p.309.

[101] Lauri Hannikainen says that "the number of peremptory obligations on States to respect human rights is at most quite limited." Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Helsinki: Finnish Lawyers' Publishing Company, 1988), p.428.

[102] According to Ian Brownlie, *jus cogens*, being overriding principles of international law, are "rules of customary law which can not be set aside by treaty or acquiescence but only by formation of a subsequent customary rule of contrary effect." Examples of such rules include the prohibition of

> [t]here certainly exists a consensus that certain rights - the rights to life, freedom from slavery and torture - are so fundamental that no derogation may be made... this being said, neither the wording of the various human rights instruments nor the practice thereunder leads to the view that all human rights are *jus cogens*.[103]

In sum, given the balance of authorities and legal structure of the Declaration, although certain human rights enunciated in its text may have gained a peremptory obligation on the part of States, the Declaration in itself does not impose binding obligations on member States.

3. The International Covenants on Human Rights and the Optional Protocol

The Universal Declaration of Human Rights, as has been seen, which lacks any provision for its implementation, led to the International Covenant on Economic, Social and Cultural Rights (Economic Covenant),[104] the International Covenant on Civil and Political Rights (Political Covenant),[105] and the Optional Protocol[106] in the form of binding treaties, which were adopted in 1966 and came into force in 1976.[107]

---

aggressive war, the law on genocide, the principle of racial non-discrimination, the law concerning crimes against humanity, and the rules prohibiting trade in slaves and piracy. Brownlie, *supra*, n.93, p.513. For details of *jus cogens* in the field of human rights, see Hannikainen, *supra*, n.101, pp.425-519.

[103] Higgins, "Derogations under Human Rights Treaties" (1976-77), 48 British Yearbook of International Law, p.282.

[104] GA Res.2200.21 UN GAOR Supp.(No.16) at 49. UN Doc.A/6316 (1966).

[105] *Ibid.*, 2d, at 52.

[106] *Ibid.*, 2d, at 59.

[107] In this section I shall briefly discuss the legal character of these instruments. Details of their implementation mechanisms and enforcement processes will be discussed in the next chapter.

In comparison with the U.D.H.R., there are more rights set out in the Covenants and these rights are defined in more detail. The Political Covenant enumerates a wide range of "individual rights" in Articles 6-27.[108] In the Economic Covenant, partly due to the emerging influence of Third World counties in the U.N.,[109] socio-economic rights are greatly expanded in Articles 6-13, 15.[110]

a. Obligations of the State Party

Part II of each Covenant stipulates the obligations assumed by the contracting parties. With regard to the domestic implementation of these Covenants, each of them provides a distinctive articulation. Article 2 (1) of the Political Covenant provides that each State Party "undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present

---

[108] The Covenant set forth the right to life, the right not to be subjected to torture, the prohibition of slavery and the slave trade, the right to liberty and security of the person, the rights of detained persons to be treated with humanity and respect, freedom from imprisonment for debt, freedom of movement, freedom of aliens from arbitrary expulsion, the right to a fair and public trial, freedoms of thought, conscience and religion, freedom of opinion and of expression, the right to peaceful assembly, the right of association, the right to marry, the rights of children, the right of citizens to take part in the conduct of public affairs, and certain rights of ethnic, religious and linguistic minorities.

[109] In this regard, Henkin has observed the changing composition of international society:

> There were 58 members in the UN in 1948, 122 in 1966 when the Covenants were adopted. Most of the additional members were new states that had recently been colonies, and their admission into the international system changed the balance between traditional and new states, between developed and developing, between "libertarian," "socialist," and various "mixed" societies.

Supra, n.91, pp.810-811. As of May 1993, there are 183 member States.

[110] Those rights are the right to work, the right to enjoy just and favourable conditions of work, the right to form and join trade unions, including the right to strike, the right to social security including social insurance, family rights, the right of everyone to an adequate standard of living, the right to be free from hunger, and to the enjoyment of the highest attainable standard of physical and mental health, the right to education, the right to take part in cultural life and enjoy the benefits of scientific progress.

Covenant." This is generally understood as an obligation imposed on State Parties to render "immediate application" of enumerated human rights standards in their domestic legal systems. Article 2 (1) of the Economic Covenant provides that each State Party "undertakes to take steps,... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant." The Economic Covenant, called "promotional convention", sets out standards which require the contracting parties to secure the progressive realization of enumerated rights.

These different approaches to domestic implementation are based on the idea that civil and political rights, being "legal" rights by their nature, are immediately applicable, while economic, social and cultural rights, being "programme" rights, require a certain period of time for their implementation.

The obligation of "immediate implementation" in the Political Covenant is, however, somewhat weakened by the second paragraph of Article 2, which states "where not already provided for by existing legislative or other measures, each State Party... undertakes to take the necessary steps... to adopt such legislation and such measures as may be necessary to give effect to the rights recognized in the present Covenant." This provision does not even require that these "necessary steps" be taken immediately or within a reasonable time.

This clause was intended to encourage ratification by the largest possible number of States of the Political Covenant while recognizing that some States would be incapable of immediate acceptance of all the obligations resulting from the

Covenant covering an extensive list of rights.[111] Accordingly, it is possible for States to ratify the Covenant without immediately complying with the obligations it contains, provided that they have the intention of doing so.[112] Thus, the Political Covenant, containing "the possibility of progressive application", has an air of obscurity regarding the obligation of immediate application on the part of State Parties.

A list of rights in the two Covenants is, as seen earlier, very extensive. It is argued that, due to this extensiveness, some definitions are so general that "they appear to be more statements of political principle or policy than of legally enforceable rights."[113] As a result, the Covenants weaken their legal force to impose obligations upon Parties. Above all, given the fact there is no ultimate effective sanction against violators of obligations,[114] it is indisputable that most rights recognized in the two Covenants are not absolute, so that their implementation rests on the goodwill of States Parties.

---

[111]. A.H.Robertson, *supra*, n.17, p.34. See also UN Doc. A/2929, chapter V, para. 8.

[112]. Robertson, *Human Rights in the World* (Manchester: Manchester University Press, 1972), p.83.

[113]. Robertson, *supra*, n.111, p.36.

[114]. See L.C.Green, "Institutional Protection of Human Rights"(1986), 16 Israel Year Book on Human Rights, pp.97-98.

4. Human Rights Standard-Setting and NGOs

a. The San Francisco Conference

At the San Francisco Conference of 1945 where the U.N. Charter was drafted, forty-two non-governmental organizations were invited to serve as consultants to the United States delegation.[115] These "consultants" played a considerable role in the improvement of human rights provisions in the Charter.

Recognizing the lack of emphasis on human rights in the Dumbarton Oaks proposals, the blueprint of the Charter, these NGOs lobbied the U.S. delegation to set forth a number of their suggestions[116] at the conference, by stating that their proposals were not merely the program of one or two NGOs in the United States, but reflected the fundamental desires of the vast majority of people.[117] The United States succeeded in persuading the other sponsoring powers and, as a result, the Charter includes a larger number of human rights provisions than appeared in the earlier Dumbarton Oaks proposals.[118] Charles Malik, former president of the Council and member of its Human Rights Commission, stated the work at San Francisco leading to these results was "greatly aided by reasoned pressure from certain powerful non-governmental organizations."[119]

---

[115] These NGOs included the National Federation of Women's Clubs, the National Council of Women, the National Board of the YWCA, the National Council of Jewish Women, the National Women's Trade Union League, the National Federation of Business and Professional Women's Clubs, the American Federation of Labour and the Congress of Industrial Organizations, the National Association for the Advancement of Coloured People and American Association for the United Nations. Thomas M.Franck, "Great Expectation: An Exploration of the Exaggerated Hopes Aroused by the U.S. Campaign for Ratification of the U.N. Charter", in T.Buergenthal, ed., *Contemporary Issues in International Law* (Kehl: N.P.Engel Publisher, 1984), p.295.

[116] After the Dumbarton Oaks proposals had been made public in October 1944, the Joint Committee on Religious Liberty issued a memorandum in which it advocated the establishment of a special agency under the UN ECOSOC with responsibility in the area of human rights; it also endorsed the idea of an international bill of rights (prepared at the initiative of the American Jewish Committee) as a long range goal. In the first months of 1945, the American Jewish Congress and the Synagogue Council of America made a similar proposal for the creation of an international human rights agency. See Jan H.Burgers, "The Road to San Francisco: the Revival of the Human Rights Idea in the Twentieth Century"(1992), 14 Human Rights Quarterly, p.476; Sidney Liskofsky, "The United Nations and Human Rights: Alternative Approaches" in D.Sidorsky ed., *Essays on Human Rights: Contemporary Issues and Jewish Perspectives* (Philadelphia: The Jewish Publication Society of America, 1979), pp.46-47.

[117] O.Nolde, *Free and Equal Human Rights in Ecumenical Perspective* (1968), pp.21-24.

b. The United Nations Charter

Among the human rights provisions newly enunciated in the Charter,[120] Articles 68 and 71 are the most innovative. Article 68 says that:

> the Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such commissions as may be required for the performance of its functions.

The establishment of the Commission on Human Rights is the most significant reference to human rights, especially in light of the development of subsequent U.N.

---

[118] The Dumbarton Oaks proposals mentioned human rights only in one place in the last chapter: "the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms." Burgers, *supra*, n.116, p.474.

[119] Quoted in White, *supra*, n.57, p.262. The NGOs' efforts were also acknowledged in the official report from Secretary of State Stettinius to President Truman:

> In no part of the deliberations of the Conference was greater interest displayed than by the group of American Consultants and groups concerned with the enjoyment of human rights and basic freedoms to all peoples. They warmly endorsed the additions to the statement of objectives. Beyond this they urged that the Charter itself should provide for adequate machinery to further these objectives. A direct out growth of discussions between the United States delegation and the Consultants was the proposal of the United States delegation in which it was joined by the other sponsoring powers that the Charter [Article 68] be amended to provide for a Commission on Human Rights.

Nolde, *supra*, n.117, p.25.

[120] The NGOs also proposed the inclusion in the Charter of an "International Bill of Rights", but time did not permit its formulation at the conference.

human rights instruments.[121] It is particulary important that the Charter specifically obligated the Council to establish the Commission on Human Rights. Had there been no such obligation in the Charter, the Commission on Human Rights might have been in a very unstable position. This is especially likely given the practice of the Council that, under its discretion, both the sub-commisson on the Prevention of Discrimination and Protection of Minorities and the sub-commission on Freedom of Information and of the Press were abolished in 1951.[122]

Article 71, recognizing the need for citizen participation, provides that the Council "may make suitable arrangements for consultation with non-governmental organizations", both international and national, "which are concerned with matters within its competence." The principles which govern these consultative arrangements with the U.N. specify that:

> [such arrangements] are to be made on the one hand, for the purpose of enabling the Council or one of its bodies to secure expert information or advice from organizations having special competence... and, on the other hand, to enable organizations which represent important elements of public opinion to express their views.[123]

The ECOSOC has established three categories of NGOs as having "consultative status". Category I comprises organizations which have a basic interest in most of the activities of ECOSOC and are closely linked with the economic and social aspects of areas which they represent (e.g., International Chamber of Commerce and League of Red Cross Societies). They are entitled to take part in all meetings of the Council and its Commission, submit proposals for the agenda, circulate memoranda, and send representatives to speak at public meetings. Category II - human rights NGOs are normally assigned to this category[124] - consists of bodies having particular competence in and concerned specially with, certain aspects of the Council's work. Category III, known as "Roster", comprises organizations concerned with mobilizing public opinion and disseminating information (e.g., The Boy Scout World Bureau and the World University Service). Organizations in Category II and III may submit memoranda and send observers to public meetings, where they may make oral statements with the permission of the chairperson.[125]

---

[121] J.Humphrey, "The U.N. Charter and the Universal Declaration of Human Rights" in Even Luard ed., *supra*, n.25, p.45.

[122] See Robert E.Asher et al, *The United Nations and Promotion of the General Welfare* (Washington D.C.: The Brookings institution, 1957), p.42. At the request of the General Assembly, the sub-commission on the Prevention of Discrimination and Protection of Minorities remained functioning. *Ibid*.

[123] ECOSOC Res.288 (B)(X) of February 27, 1950. The resolution was superseded by Res.1296(XLVI) of May 23, 1968.

Article 71 established not only a formal relationship between NGOs and the U.N. bodies in the ECOSOC, but also gave them status to participate in the decision-making process of U.N. organs. This experiment is one of the greatest innovations under the U.N. regime. By virtue of the interaction between the governmental and non-governmental aspects of society, the U.N. took a significant step toward true and full democracy on the international level.

---

[124]. Examples of the NGOs under this category include Amnesty International, the Anti-Slavery Society, the International Association of Democratic Lawyers, the International Commission of Jurists, the International Committee of the Red Cross, the International League for Human Rights and the World Jewish Congress.

[125]. The practice of such NGOs in the U.N. and its effects on the implementation mechanism will be discussed in detail in the next chapter.

c. The International Bill of Human Rights

Based on their formal status recognized in Article 71 of the U.N. Charter, NGOs have greatly contributed to the U.N. standard-setting activities in the drafting of the Universal Declaration of Human Rights, and of certain provisions in the International Covenants. As Charles Malik said:

> many non-governmental bodies, especially church groups (Roman Catholic, Protestant and Jewish) - showed the keenest interest [in the work of the Human Rights Commission] and, in many instances, contributed actual texts.[126]

He recalled that Article 16 of the U.D.H.R. on the Rights of the Family owed much of its inspiration to Catholic groups. Similarly Article 18 on Freedom of Religion or Belief was attributable to Jewish and Christian NGOs.[127] The latter movement subsequently led to the adoption of the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief.[128]

These NGOs were active lobbies to the representatives of governments, attending meetings of the Human Rights Commission. At the fifth session of the Commission, for example, which was held from May 9 to June 20 in 1949, White noted that:

> eleven different organizations spoke a total of twenty times. In addition to these formal statements, the representatives of those organization engaged in hundreds of conversations with governmental representatives and with officials of the United Nations Secretariat for the purpose of presenting their views, both giving and receiving

---

[126] O.Nolde, *supra*, n.117.

[127] *Ibid*., p.11.

[128] G.A. Res. 36/55 of 25 November 1981. For the text, See Brownlie, *supra*, n.86.

information.[129]

At the time, NGOs were not entitled formally to set forth proposals in their own name and thus they needed the sponsorship of governmental representatives. Malik recalled in this respect that: "the non-governmental organizations, therefore, served as batteries of unofficial advisers to the various delegations, supplying them with streams of ideas and suggestions."[130] Their efforts and contributions to the Universal Declaration earned the high praise of the Human Rights Division of the United Nations Secretariat and, in the words of White, "without their support the Declaration could hardly come into being."[131]

d. Other U.N. Human Rights Instruments

In addition to the International Bill of Human Rights, the U.N. has adopted a considerable number of conventions and declarations concerning human rights.[132] NGOs have played an instrumental role in the U.N. standard-setting activities, especially in three areas of human rights: (1) the abolition of torture; (2) the rights of the child; and (3) the rights of indigenous peoples.

---

[129] White, *supra*, n.57, p.263. When the final draft of the Covenants was produced at the tenth session of the Human Rights Commission, there were at least 56 representatives of 36 NGOs present. Report of the Commission, Tenth Session, 18 U.N. ESCOR Supp. (No.7) pp.1-2. U.N. Doc. E/2573 (1954).

[130] Nolde, *supra*, n.117, pp.11-12.

[131] White, *supra*, n.57, p.262, p.264.

[132] With respect to the Conventions, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide of 1948; the Supplementary Convention on the Abolition of Slavery and the Slave Trade of 1956; three Conventions on Nationality and Statelessness, which deal with the Nationality of Married Women (1957), on the Reduction of Statelessness (1961) and on the Status of Stateless Persons (1954); the Convention on the Status of Refugees (1951) and its Protocol (1966); the Convention on the Political Rights of Women (1952); the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968); the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); the Convention against Torture (1984); and the Convention on the Rights of the Child (1989). See Brownlie,

(1) The Abolition of Torture

The Declaration on the Protection of All Person from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975[133] was largely due to the world-wide campaign against torture initiated by Amnesty International (A.I.).[134] The campaign launched in 1972 was directed toward obtaining an international consensus that torture constituted an international crime. With a view to mobilizing public opinion and exercising public pressure, A.I. targeted parliaments, political parties, churches and other religious bodies, trade unions, professional groups and other organs of national and international society. In this process A.I. convened an international conference in Paris in 1973 to mobilize interest in the subject among government officials and politicians.

---

supra, n.86.

In terms of implementation mechanism, most of these conventions still remain by and large in the same category as the two International Covenants on Human Rights which lack any ultimate effective sanction in case of breach. Among exceptional arrangements, the Genocide Convention of 1948, defining genocide as an international crime, obligates the contracting parties to "undertake to prevent and punish." The party is required to enact legislation providing effective penalties for persons guilty of genocide (Art.V). Similarly, the Apartheid Convention of 1973 obligates parties to adopt legislation to punish persons guilty of the "crime of Apartheid"(Art.IV).

[133]. G.A. Res. 3452(XXX) of 9 December 1975. For the text, Brownlie, *supra*, n.86.

[134]. Amnesty International was founded in 1961 by an English lawyer named Peter Benenson originally to deal with the release of prisoners of conscience. For the past thirty years its mandate has expanded to campaigns against torture and the death penalty, confronting the phenomena of forcible "disappearance" and extrajudicial executions, and ensuring fair trials for political prisoners. Its outstanding work was confirmed by the award of the Nobel Peace Prize in 1977. See *Amnesty International Report* (New York: Amnesty International, 1992).

This movement led to the adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.[135] Having associated with the International Commission of Jurists[136] and other NGOs, a group of NGOs took an active role during the debates in the Working Group of the Commission on Human Rights. Their greatest achievement was the inclusion in the text of the principle of universal jurisdiction for penal prosecution of torturers (Article 5) which the original draft did not mention.[137]

(2) The Rights of the Child

The involvement of NGOs in the promotion of children's rights dates back to the 1920s. Save the Children International Union (SCIU), the earliest non-governmental organization in this field, had played an active role in the adoption of the 1959 Declaration of the Rights of the Child.[138]

---

[135] . G.A. Res. 39/46 of 10 December 1984. The Convention entered into force on 26 June 1987 after twenty states ratified or acceded to it. For the text, Brownlie, *supra*, n.86.

[136] . The International Commission of Jurists (ICJ) was founded in 1952 with its headquarters in Geneva. The Commission consists of jurists who represent various legal systems of the world. Its objective is to promote the understanding and observance of the rule of law throughout the world. Examples of standard-setting to which the ICJ has contributed include the U.N. Torture Convention, the European Torture Convention, the African Charter on Human and Peoples' Rights, the reform of the Japanese Mental Health Law and the instrument on the independence of the Judiciary. See Niall MacDermot, "The Role of NGOs in Human Rights Standard-Setting" (1991), 90/1 Bulletin of Human Rights, at 42.

[137] . At the Working Group sessions the NGOs stressed that it was not enough to have governments adopt a code of conduct. They "vigorously supported provisions giving all states parties universal jurisdiction to prosecute individual torturers." Howard Tolley, Jr., "Popular Sovereignty and International Law: ICJ Strategies for Human Rights Standard Setting"(1989), 11 Human Rights Quarterly, p.571. See also Perter R.Baehr, "The General Assembly: Negotiating the Convention on Torture" in David P. Forsythe ed., *The United Nations in the World Political Economy* (New York: St.Martin's Press, 1989), p.39.

The Year of the Child (1979), declared in honour of the 20th anniversary of the 1959 Declaration, marked a substantial expansion of NGO movements. NGOs, including the International Association of Democratic Lawyers, the Polish Association of Jurists and the I.C.J., convened the Warsaw Conference on children's rights[139]; the U.N. established the Working Group for preparation of a draft convention on the rights of the child. In 1983 under the leadership of the Defence for Children International (DCI), thirty-five NGOs, including NGOs without consultative status, established an informal NGO *Ad Hoc* Group (NGO Group)in Geneva in order to integrate the opinion of NGOs. Persistent attempts were made to lobby government missions and delegations, including distributing an NGO Group report at the session of the Working Group and the International Conference. NGOs' intervention at the first stage tended to be treated critically by the delegations; nevertheless, "[a]s the NGO Group's influence grew, its activities became less obvious and were integrated into the Working Group process."[140]

Many articles of the draft convention, which was finally adopted by U.N.

---

[138] SCIU was established in Geneva shortly after World War I by an English woman named Eglantyne Jebb. In 1924 the SCIU drafted the first declaration of the rights of the child, which was known as the Declaration of Geneva. The Declaration was adopted by the League of Nations in 1925. This Declaration laid the foundation for the 1959 Declaration of the Rights of the Child. For the text of the Geneva Declaration of the Rights of the Child, see 129 *Official Journal* (1934) Special Supplement, at 68; the 1959 Declaration, U.N., *supra*, n.9, at 366.

[139] See e.g., "Warsaw Conference on the Legal Protection of the Rights of the Child"(1979), 22 ICJ Review, pp.63-64.

[140] Cynthia P.Cohen, "United Nations Convention on the Rights of the Child"(1989), 83 Proceedings of the American Society of International Law, p.165.

General Assembly on November 20, 1989,[141] were proposed and influenced by these NGOs. In particular, Articles 34 through 39 (mainly dealing with Pornography, Abduction and Trafficking of Children, and Torture and Inhuman Punishment) are solely the result of concerted NGO Group activity.[142] The NGO Group noted that the NGO impact became greater after the establishment of the NGO *Ad Hoc* Group.[143] The instructive role played by the NGOs at the drafting, leading to a successful collaboration of NGOs and the U.N., was acknowledged by the government delegations which participated in the sessions.[144]

(3) The Rights of Indigenous People

A unique and innovative approach in U.N. standard-setting is taken in the area of the rights of indigenous peoples, which is the subject of current U.N. efforts at drafting a Declaration. In this area some 135 NGOs, including those without consultative status,[145] are entitled to participate in the drafting session of the

---

[141]. GA Res. 44/25 GAOR, 44th Sess., Supp. no.49. For the text, 28 *International Legal Materials* (1989), pp.1459-76.

[142]. Cohen, *supra*, n.140.

[143]. Summary of Proceedings of Informal NGO *Ad Hoc* Group held in Geneva on May 17-19, 1989, at 9.

[144]. Cohen notes that "[w]hen [the draft convention] was adopted by the Commission on Human Rights, nearly every government statement in support of the Convention on the Rights of the Child made complimentary references to the important role of NGOs in the drafting process." *Supra*, n.140, p.164.

[145]. These organizations include approximately 10 indigenous peoples' organizations which have consultative status, 25 other NGOs with consultative status, 70 indigenous peoples organizations without consultative status but represented with the consent of the Working Group, 30 other organizations and groups without consultative status and also represented with the consent of the Working Group. See *Report for the Working Group on Indigenous Populations of its Seventh Session* U.N. Doc. E/CN.4

Working Group on the Indigenous Populations.

In response to the efforts made by numerous NGOs concerned with the rights of indigenous peoples,[146] the ECOSOC established the Working Group in 1982 with the aim of reviewing developments pertaining to the protection of human rights of indigenous peoples.[147] From its first session, the Working Group took the unprecedented step of allowing oral and written interventions from all indigenous organizations regardless of their formal status. By a resolution of the Sub-Commission in 1985 (1985/22), the Working Group has shifted its focus to preparing a draft Declaration on the Rights of Indigenous Peoples, of which a final text will be forwarded to the General Assembly in 1993.

This liberal approach adopted in the Working Group, responding to the real needs and aspirations of indigenous peoples who have sought direct participation in the work, is one of the most significant and distinctive features in current U.N. standard-setting activities. In addition, the revision of the I.L.O. Convention on Indigenous and Tribal Populations (No.107) of 1957,[148] resulting in the new

---

/Sub.2/1989/36, pp.6-7.

[146]. A series of international Conferences was convened at the initiative of NGOs. E.g., A Non-Governmental Organization (NGO) Conference on Discrimination against Indigenous Peoples of Americas in Geneva in 1977, the conference by the World Council of Indigenous Peoples in Sweden in 1977, the World Conference to Combat Racism and Racial Discrimination in 1978, the VIII Inter-American Indian Conference in Mexico in 1980, and the NGO Conference on Indigenous Peoples and the Land in Geneva in 1981.

[147]. E.S.C. Res. 34.U.N. ESCOR Supp. (No.1) at 26-27, U.N. Doc. E./1982/82 (1982).

[148]. I.L.O., *International Labour Conventions and Recommendations: 1919-1981* (Geneva: I.L.O., 1982), pp.858-64.

Indigenous and Tribal Peoples Convention (No.169) of 1989,[149] drew a great deal of interest on the part of the indigenous organizations and groups.[150] These new institutional approaches are relevant to the evolving attitude regarding collective rights, which asserted that existing international legal arrangements in protecting indigenous peoples are inadequate.

This area of rights being in the formative stage leaves many tasks for both NGOs and the U.N. in producing a treaty. In view of the conflict between individual rights and collective rights, as previously observed,[151] the NGOs in this field are required to act as "mediators",[152] while maintaining their pioneering work in legitimizing the collective rights of indigenous peoples in international law.

e. Concluding Remarks

The above observations have shown the constant involvement of NGOs in the development of international human rights legislation. Their historical contributions eventually led to a formal status of NGOs so that they may participate in the elaboration of international instruments. Although the major contribution of NGOs is said to be towards the implementation of human rights rather than the development of international human rights norms,[153] their persistent and constructive efforts in the latter respect were acknowledged by U.N. officials and authorities. In the words of the former Secretary General U Tant at a NGO Conference in 1968:

---

[149] 28 *International Legal Materials* (1989), pp.1384-91.

[150] Indigenous and nonindigenous NGOs played a crucial role at the Committee of Experts meeting in Geneva in September 1986. Indigenous NGOs were represented on three levels: (1) a nominee of an indigenous NGO; (2) formal observers; and (3) informal observers. This kind of NGO representation, not formally part of the I.L.O. structure, was unprecedented. Anthony Simpson, "The Role of Indigenous Non-governmental Organizations in Developing Human Rights Standards Applicable to Indigenous Peoples"(1987), 81 Proceedings of the American Society of International Law, p.284. See also N.Lerner, *Group Rights and Discrimination in International Law* (Boston: Martinus Nijhoff Publishers, 1991), Chap.5.

[151] *Supra*, Chapter I, pp.40-47.

[152] In his analysis of the characteristics of NGOs, Jerome Shestack counts "mediation" in the application of various standards, as one of the functions of NGOs. Shestack, "Sisyphus Endures: The International Human Rights NGO"(1978), 24 New York Law School Law Review, p.100.

> This may be an appropriate moment recalling once again the decisive role of nongovernmental organizations in obtaining the inclusion in the United Nations Charter of appropriate references to the international obligation of States to promote respect for human rights through national measures supported and encouraged by the action of the international community, effectively organized for that purpose.[154]

Antonio Cassese observes that there have been such extensive U.N. efforts regarding the elaboration of international instruments that little room remains for further U.N. or NGO action in this regard.[155] However, due to the proliferation of NGOs representing diverse interests, numerous draft instruments produced by NGOs are being prepared with an eye toward eventual approval of the U.N General

---

[153]. Antonio Cassese, "How Could Nongovernmental Organizations Use U.N. Bodies More Effectively?"(1979), 1 Universal Human Rights, p.75; Theo van Boven, "The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy"(1990), 20 California Western International Law Journal, p.207.

[154]. U.N. Doc. SG/SM/999, at 2 (1968).

[155]. Cassese, *supra*, n.153, p.78. Although at the 1993 Human Rights Conference in Vienna the NGOs sought to ensure that the basic human rights were recognized as belonging to all persons regardless of their cultural or ethnic background and apparently major progress was made in this regard in so far as the rights of women and children were concerned. Moreover, as a result of NGO pressure, progress was made concerning recognition for the need of the appointment of a U.N. Commissioner of Human Rights. See "UN Human Rights Commissioner Gains Support" *The [Toronto] Globe and Mail* (26 June 1993) A8.

Assembly.[156]

The role of NGOs as a resource in the development of human rights norms has been increasingly recognized in the U.N., however, two things should not be overlooked. First, the major NGOs active in the field of human rights have been, and still are, predominantly Western-oriented. The internationally recognized instruments accordingly reflect the idea of Western liberal culture, i.e., the protection of the individual, and civil and political rights. Consequently, commentators observe that:

> despite the general support such groups [like Amnesty International, the International Commission of Jurists, the International Committee of the Red Cross] frequently give to the elaboration of international conventions on the social, economic, and cultural rights of groups, these protective associations still consider their primary task to be the safeguarding of the individual's rights, in the face of the repressive power of political institutions - most particularly that of the state but also of multinational corporations and terrorist organizations.[157]

In terms of non-Western perspectives, third world governments doubt the impartiality of NGOs dominated by Western interests. Some Third World nations have no equivalent institution at the national level. The Chinese translation for NGO is "anti-government" organization.[158] The current movement by indigenous peoples' organizations, as previously observed, is still an exceptional case - which will hopefully promote the liberal policy adopted by the working group to the higher institutional level in the U.N.

---

[156] Examples of drafts being elaborated by NGOs include: (1) a Declaration on the Right to Leave and to Return to One's Country, prepared by the International Institute of Human Rights and the Jacob Blaustein Institute for the Advancement of Human Rights; and (2) the draft for a Declaration on Protection of All Persons from Enforced and Involuntary Disappearances, sponsored by the International Commission of Jurists. See van Boven, *supra*, n.153, pp.218-219.

[157] Harry M.Scoble and Laurie S.Wiseberg, "Human Rights NGOs: Note towards Comparative Analysis"(1976), 9 Human Rights Journal, p.616.

[158] Tolley, *supra*, n.137, pp.562-63. Evidence of this context is found in the 58th session of ECOSOC where the representative of the People's Republic of China urged the expulsion of all NGOs with ties to Taiwan (being regarded as the Chiang Kai-shek clique) as a way of continuing political pressure on the Taiwan government. U.N. Doc. E/SR.1944 (1975), at 3, 21-22.

Second, standard-setting activity in the U.N. being a political action by member States, the governmental representatives hold the key to adopting or modifying international human rights instruments. This political reality is constantly commented on in the reports of NGOs[159] and writers.[160] Accordingly, the success of NGOs' norm-making activities ultimately relies on gaining and maintaining support from governments. In this respect, personal contacts with key figures and decision-makers are an essential strategy factor.[161]

In light of the U.N. Charter proclaiming "We the Peoples of the United

---

[159] The NGO *Ad Hoc* Group on the Rights of the Child observed at an evaluation meeting that: "NGOs increasingly realized the relative effectiveness of working with and through a wide range of government delegates instead of trying to push their proposals directly from the floor." Summary Proceedings of Informal NGO *Ad Hoc* Group held in Geneva on May 17-19, 1989, at 14.

[160] E.g., L.C.Green observes that:

> [l]ike other organs of the United Nations, the [General] Assembly is a political body comprising politicians, who decide political questions for political reasons.... the Members of such an organ who... are legally entitled to base their arguments and their votes upon political considerations.

Green, *supra*, n.1, pp.263-64; See also van Boven, *supra*, n.153, p.212; Archer notes that "successful NGOs may wither, leaving the field to national governments." *Supra*, n.25, p.166.

[161] By citing the drafting of the Universal Declaration of Human Rights, David Weissbrodt observes the influence of NGOs in their informal contact to the government delegates and U.N. officials:

> By their presence in the drafting sessions and by their individual contacts with national delegates or U.N. staff, NGO representatives can have even more impact than their more formal interventions in open sessions.... NGOs are not dependent entirely upon their rights to make oral and written interventions. Their influence may be felt even more strongly in informal cooperation with governmental representatives.

Weissbrodt, "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights" in T.Meron ed., *supra*, n.64, p.419, p.429.

Nations",[162] the United Nations is supposed to represent peoples as well as nations. However, the decisive actors in this forum are, as indicated earlier, governmental representatives who are not necessarily conceived of as the genuine representative of the "peoples". Parliamentary involvement is limited or excluded and as a result, a good deal of international legislation is "the product of national and international bureaucracies without proper democratic control."[163] Due to this bureaucratic legislation that has been a long practice in the realm of international law, Parliaments are often faced with "already-completed texts" which tend to serve the interests of States at the inter-States level.[164]

By Article 71 of the U.N. Charter, as noted earlier, allowing NGOs access to the discussions of U.N. forums, the NGOs are in a position to provide a two-way channel of communication between the U.N. and the public in member States. The role of NGOs in this context is to renovate the old style treaty-making tradition by means of their direct participation in the law-making process, while creating the climate for wider acceptance of human rights standards by member States. This is connected to advancing international democracy; something that Article 71 is intended to promote.[165] NGOs, not only as the genuine representatives of

---

[162] The Preamble of the U.N. Charter.

[163] van Boven, *supra*, n.153, p.223.

[164] *Ibid.*, pp.223-4. By citing the recent example of the Schengen agreement (on the gradual abolition of control on the common borders of Western Europe) of which conclusion was postponed in 1989 by the protests on the part of NGOs, he critically observes the tradition of "the old style treaty-making process" in international legislation.

[165] *Supra*, p.95.

"peoples" but also as promoters of international democracy, must play a catalytic role in human rights standard-setting activities so that a more "people-oriented" international law can develop.

CHAPTER III

IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS AND THE ROLE OF NGOs

A. Human Rights Actors in the Area of Implementation

In examining the protection of human rights in the international arena, it is necessary to understand that there exists a large assortment of actors which contribute to the human rights struggle and that those actors, consisting of state and non-state entities, are closely intertwined to implement international norms. Thomas Buergenthal has phrased the issue well:

> The interaction between international systems and techniques for the protection of human rights involves a complex process in which the U.N., the specialized agencies, the regional organizations, and numerous governmental and non-governmental entities interrelate in a variety of different ways and on many different levels. We need to know more about the dynamics of this process. Without such knowledge we can not hope to make optimal use of existing international institutions for the protection of human rights.[1]

Human rights actors can be classified into governments, inter-governmental organizations (IGOs) and NGOs, each of which has its own features and roles.

Under the present nation-state system, governments are the key actors in the protection of human rights. As observed with regard to the international standard-setting activities, international law is largely inter-governmental law, adoption of which rests totally on the governmental representatives. In this sense, governments are the instruments of enforcing international human rights norms through national institutions. This complicates the enforcement of international human rights since governments are also the main offenders in the human rights arena.[2] Governments, on the one hand, "are proud of the humanitarian ideals which form one basis for legitimacy of the national state"[3] and on the other hand, are reluctant to take human rights initiatives since "the most elementary concept of human rights requires by its very nature a diminution of state power."[4]

---

[1] Buergenthal, "International and Regional Human Rights Law and Institutions: Some Examples of Their Interactions"(1977), 20 Texas International Law Journal p.330.

Inter-governmental organizations (IGOs) are the entities that contribute the most to the institutional protection of human rights. These include the United Nations, its special committees (e.g., the Social Committee of 24 on Decolonization), its offices (e.g., the Office of the U.N. High Commissioner on Refugees) and special agencies (e.g., the I.L.O., U.N.E.S.C.O., W.H.O.), and on the regional level, the Council of Europe, the Organization of American States (O.A.S.), and the

---

[2]. That governments are violators is true from a Western liberal perspective of human rights and from a social and Third World view, depending on which rights are given precedence. See George W.Shepherd,Jr., "Transnational Development of Human Rights: The Third World Crucible " Ved P.Nanda et al ed., *Global Human Rights: Public Policies, Comparative Measures, and NGO Strategies* (Boulder, Colorado: Westview Press, 1981), pp.213-18. Harry M.Scoble and Laurie S.Wiseberg point out the following as violators of human rights: multinational corporations, national liberation groups and governments. Governments have been the offenders "since the emergence of the nation-state as the most primary unit of political organizations." Scoble and Wiseberg, "Human Rights NGOs: Note towards Comparative Analysis"(1976), 9 Human Rights Journal, pp.616-17.

[3]. David Weissbrodt, "The Role of International Non-governmental Organizations in the Implementation of Human Rights "(1977), 12 Texas International Law Journal, p.410.

[4]. Robert A.Friedlander, "Human Rights Theory and NGO Practice: Where Do We Go From Here?" in Nanda et al ed., *supra*, n.2, p.222. In this respect, a recent example is found in the assertion by a bloc of nearly 50 nations, led by China, Syria, Pakistan and Iran in advance of the 1993 Vienna Conference on Human Rights. Those nations, while seeking to preserve the ruling power under their regimes, intended to undermine the principle of human rights as universal norms. See "Focus of Rights Conference: Theory, Not Specifics" *The Washington Post* (2 June 1993) A9. See also *supra*, Chapter II, p.91, n.155.

Organization of African Unity (O.A.U.).

While some IGOs have relatively impressive records, their record overall is disappointing, largely due to their inter-governmental nature. Member States, being protective of their sovereignty, do not desire to be restricted by global norms. In addition, governments are not only sensitive to criticism of human rights violations within their own territories, but they are also reluctant to criticize other governments for such violations in the international forum.[5] This reluctance stems from the diplomatic considerations of maintaining friendly relations and from fear of the counter-effect on the plight of these countries' own suppressed people, e.g., indigenous peoples.[6] In the U.N. system, Antonio Cassese enumerates the inherent limits of its machinery which diminish the protection of human rights:

> (1) Governments' interests tend to outweigh humanitarian ideals;
> (2) The resolutions and declarations lack binding effect on member-

---

[5]. See John Salzberg, "U.N. Prevention of Human Rights Violation: The Bangladesh Case"(1973), 27 International Organization, pp.115-27; Weissbrodt, "The Contribution of International Non-governmental Organization to the Protection of Human Rights" in T.Meron ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), Vol.2, p.411, n.42. Such criticism, however, appears often to be given as the reason for denying foreign (economic or military) aid. For instance, soon after the November 1991 massacre at East Timor in Indonesia, the Netherlands and Canada suspended aid to Indonesia. The Clinton administration has also stepped up criticism on this issue while threatening a withdrawal of preferential tariffs for Indonesian products. The U.S. also suggested to India that unless its abuses cease in Kashmir, U.S. military sales may be stopped. See "Vienna Showdown" *Far Eastern Economic Review* (17 June 1993), p.20 and p.17.

[6]. Pei-heng Chiang cites a comment by the U.N. staff on the counter-effect of this issue:

> One human rights official predicts that no governments are likely to bring up the American Indians in the United States, because they are afraid to set precedents which might be applied to themselves as well. Almost every country, he noted, has indigenous people.

Chiang, *Non-Governmental Organizations at the United Nations* (New York: Praeger Publisher, 1981), p.204. However, the current movement toward the U.N. Declaration on the Rights of Indigenous Peoples is changing the world-wide climate regarding this common issue. See e.g., Gudmundur Alfredsson and Alfred de Zayas, "Minority Rights: Protection by the United Nations"(1993), 14 Human Rights Law Journal, p.3.

> states;
> (3) the consensus oriented procedure often results in ambiguous compromise; and
> (4) "Safeguard clause" in human rights standards may provide loopholes for governments.[7]

As a result, the Human Rights Commission and related bodies "are frequently paralysed because of an inability to reconcile and conciliate the varying interests and ideologies of its members."[8] In particular, an assertion by non-Western countries where Third World States and Islamic nations demand for acknowledgement of ethnic, cultural and historic differences makes such conciliating works difficult.

Given the governmental dilemma and the IGO's constitutional limitations in implementing human rights, the importance of NGOs should be emphasized. A U.S. Congressional staff report notes the nature and advantage of NGOs:

> The international nongovernmental organizations are a vital contributor to the international protection of human rights. Their vitality arises principally from their independence from governments - both financial and otherwise - which enables them to view objectively human rights situations in various countries without regard to political considerations. These traits of objectivities and political independence make it possible for nongovernmental organizations to speak out against human rights violations when governments and international organizations are often silent.[9]

---

[7] Cassese, "Progressive Transnational Promotion of Human Rights" in B.G.Ramcharan ed., *Human Rights: Thirty Years After the Universal Declaration* (The Hague: Martinus Nijhoff Publisher, 1979), p.250.

[8] Scoble and Wiseberg, *Supra*, n.2, p.618.

[9] *Human Rights in the World Community: A Call for U.S. LeaderShip*, Report of the Subcommittee on International Organizations and Movements, Committee on Foreign Affairs, House of Representatives, 93rd Congress, 2nd Sess., 27 March 1974 (Washington: U.S. Govt. Printing Office, 1974), p.50, quoted by D.Forsythe and L.Wiseberg, "Human Rights Protection: A Research Agenda"(1979), 1 Universal Human Rights, p.17. The 1993 Vienna Conference on Human Rights is one of the recent examples that NGOs, by seeking a coordinated approach with the United Nations, have inspired the world community to pursue the "universality" of human rights in the next century. See *The [New York] Times* (June 14 1993) A3; *Supra*, Chapter II, p.91, n.155.

In addition to "objectivity" and "political independence," a positive feature of NGOs stems from their structures in which NGOs do not face the problem of ideological dichotomy and of cumbersome bureaucratic burdens.[10] Thus, NGOs are in a better position than States and IGOs freely and publicly to criticize human rights violations.

B. Implementation using Inter-Governmental Machineries

NGOs have been particularly enthusiastic in promoting and using the U.N. and its related organs as a way of dealing with allegations of human rights violations. With regard to the role of NGOs in implementing human rights on the international scene, the following discussion will focus on the implementation mechanism of two representative organs at the universal level: the Human Rights Committee, a supervisory organ established under the International Covenant on Civil and Political Rights (Political Covenant)[11] and the Commission on Human Rights, an institution under the ECOSOC, based on Article 68 of the U.N. Charter.

1. The Human Rights Committee

The Human Rights Committee is in charge of three mechanisms for implementing human rights enunciated in the Political Covenant: submission of periodic reports by State Parties (Art.40); procedure regarding inter-state complaints (Art.41 and 42); and procedure regarding "individual communications" (Art.1 and

---

[10] Yogesh Tyagi, "Cooperation Between the Human Rights Committee and Nongovernmental Organizations: Permissibilities and Propositions"(1983), 13 Texas International Law Journal, p.275.

[11] GA Res. 2200. 21 UN GAOR Supp.(No.16), 2d, at 52. UN Doc.A/6316 (1966).

5(4) of the Optional Protocol[12]). Unlike the U.N. Charter in which Article 71 stipulates the mandate of NGOs, neither the Political Covenant nor the Optional Protocol makes any reference to NGOs. Nevertheless, there presumably exist certain areas where NGOs can contribute to the implementation mechanisms under the Political Covenant and the Optional Protocol.[13]

a. Periodic Reporting System

The function of the Committee is to "study reports submitted by State Parties... [and] transmit its reports, and such general comments as it may consider appropriate, to the State Parties." It also may send them to the ECOSOC (Art.40). There are some serious problems in this system. Besides a frequent delay of report submission, the contents of State reports tends to be superficial and inaccurate.[14] As a result, the Commission must have a broad base of information sources with a view to the assessment of the reports.

Egon Schwelb mentions that "[t]he Committee is not clearly authorized to use non-governmental material in its work of examination and analysis."[15] In terms of effective functioning of the Committee, some writers who criticize the exclusion of non-governmental sources in this machinery emphasize the necessity of cooperative links between the Human Rights Committee and NGOs.[16]

---

[12]. The Optional Protocol to the International Covenant on Civil and Political Rights, GA Res. 2200. 21 UN GAOR Supp.(No.16), 2d, at 59. UN Dec.A/6316.(1966).

[13]. In the drafting process of the Covenant, provisions associating NGOs with the implementation machinery were proposed, though, due to the deep division of opinion, they were eventually withdrawn. See Tyagi, *supra*, n.10, pp.276-85.

[14]. A.H.Robertson, *Human Rights in the World* (New York: Manchester University Press, 1989), pp.42-7; J.Humphrey, *No Distant Millennium: International Law of Human Rights* (Paris: UNESCO, 1989), p.182. In addition to these problems, the Committee does not have sufficient time for the detailed scrutiny which is required, and consequently it refrains even from commenting as a body on the adequacy of the State's reports.

In practice, some NGOs have submitted information in an unofficial capacity to the Committee which has utilized this information in examining State reports. No formal objection has been raised against this practice by members of the Committee.[17] According to an estimation by one member of the Committee, "the Committee would have been 50 percent less effective without NGO expertise."[18] For instance, despite the incompleteness of the Summary Record, during the examination of the Colombian report, several members of the Committee referred to a document supplied by Amnesty International on the current situation in the country.[19] The Colombian representative then attempted to show that the charges were not well founded.[20] Although NGOs have no official authority to present information to the Committee, their direct contacts to the Committee members have assisted in formulating questions offered at the session.

---

[15]. Schwelb, "Civil and Political Rights: The International Measure of Implementation"(1968), 62 American Journal of International Law, p.823.

[16]. See Theo van Boven, "United Nations and Human Rights: A Critical Appraisal" in A.Cassese ed., *UN Law/ Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979), p.131; Tyagi, *supra*, n.10, p.284; Weissbrodt, *supra*, n.5, p.421, n.83.

[17]. Anne Bayefsky, "Human Rights: The 1966 Covenants Twenty Years Later"(1986), 80 Proceedings of the American Society of International Law, p.415.

[18]. Dana D.Fischer, "Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee"(1982), 76 American Journal of International law, p.147.

[19]. UN Doc. CCPR/C/SR.222 (1980).

[20]. UN Doc. CCPR/C/SR.226 (1980).

b. Inter-State Complaints

The Committee is further competent to consider communications from a State Party to the effect that another State Party is not fulfilling its obligations under the Covenant, but only if both States concerned have declared that they recognize its competence to receive and consider such communications (Art.41). If the Committee is unable to resolve the problem, it is referred to an *ad hoc* Conciliation Commission which will offer good offices "with a view to an amicable solution of the matter on the basis of respect for the present Covenant" (Art.42). If, however, this attempt fails, there is no other effective way to conciliate or force the State to cease the alleged breach of its obligations.

The usefulness of this type of arrangement has been doubted by many writers.[21] Commenting generally on inter-State procedures in international human rights law, John Humphrey mentions that;

> To give a state the right to complain that another state is violating human rights is one of the weakest techniques for enforcing human rights law.... The individual whose rights have been violated has no guarantee that any state will in fact sponsor his case. Indeed, it is unlikely that, unless there is some political motivation for doing so, states will interfere with what is happening in other countries,

---

[21] . See e.g., Schwelb, "The International Measures of Implementation of the International Covenant on Civil and Political Rights and of Optional Protocol"(1977), 12 Texas International Law Journal. p.161; Maya Prasad, "The Role of Non-governmental Organizations in the New United Nations Procedures for Human Rights Complaints"(1975), 5 Denver Journal of International Law and Policy, pp.450-60; P.R.Ghandhi, "The Human Rights Committee and the Right of Individual Communication" (1986), 57 The British Yearbook of International Law, pp.203-5.

particularly if their relations with them are friendly.[22]

The inter-State complaints procedure under the Political Covenant has yet been invoked.[23] Under the I.L.O.(Art.26 of its Constitution), only two cases were filed: a complaint by Ghana against Portugal and a complaint by Portugal against Liberia.[24] The motivation of both complaints has been questioned as being political.[25]

The European Convention on Human Rights of 1950[26] has a relatively impressive record, having produced eighteen inter-State cases, seventeen of which were declared admissible by the European Commission. Only one inter-State case, *Ireland* v. *United Kingdom*[27] has been submitted to the European Court of Human Rights. The comparison of respective inter-State complaints procedure is not the aim of this paper,[28] but it must be mentioned that the advanced state of the institution of a European regime is largely owing to their legal background in which member

---

[22]. Humphrey, "The International Law of Human Rights in the Middle Twentieth Century" in M.Bos ed., *The Present State of International Law and Other Essays* (Kluwer: Deventer, 1973), p.86.

[23]. The provisions of Article 41 came into force on March 28, 1979 after ten States had made declarations under the article.

[24]. I.L.O. Official Bulletin, Supp.11, April 1962 (Vol.45, No.2) and I.L.O. Official Bulletin, Supp.11, April 1963 (Vol.2).

[25]. E.Landy discusses in his work regarding the I.L.O. proceedings of Ghana v. Portugal and the retaliatory action Portugal v. Liberia. Landy, *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience* (London: Stevens and Sons, 1966), pp.175-6.

[26]. European Convention on Human Rights and Fundamental Freedom, Nov.4, 1950, 213 U.N.T.S.221; reprinted in [1950] Y.B. on Human Rights (United Nations).

[27]. *Ireland* v. *United Kingdom* [1978] Year Book of European Convention on Human Rights, at 602.

[28]. By classifying the 18 cases into six complexes, Ghandhi discusses this superior record compared to other institutions. Ghandhi, *supra*, n.21. See also Schwelb, *supra*, n.21.

States have shared a common legal foundation of "the rule of Law."[29] The functioning of the inter-State complaint procedures ultimately rests on the goodwill of the member States. Given the fact of continued non-invocation of inter-State procedures under the Political Covenant and of a potential danger of being used for political motivation, this U.N. implementing measure can not and should not be expected to be effective in the protection of human rights.

c. The Optional Protocol: Individual Communications

With regard to State Parties to the Optional Protocol, the Committee is competent "to receive and consider communications from individuals subject to [the] jurisdiction [of the party both to the Covenant and the Protocol] who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant"(Art.1 of the Protocol). The State charged with a violation is obliged to submit to the Committee "written explanation of the matter and the remedy, if any, that may have been taken by the State"(Art.4(2) of the Protocol). After examining the communication at a closed meeting, "the Committee shall forward its view to the State Party concerned and to the individual"(Art.5 of the Protocol). Although the

---

[29]. Shigejiro Tabata, *Internationalization of Human Rights* (Tokyo: Iwanami-Shoten, 1988), p.161. This view can be supported by Henkin's words:

> The countries of Western Europe doubtless believed that international human rights obligations were not necessary for them, since their national legal systems were generally satisfactory... sought to declare their devotion to human rights as a hallmark of their common values... that would not require great disturbance of existing national institutions.

L.Henkin, *The Rights of Man Today* (Boulder, Colorado: Westview Press, 1978), p.103. Similarly, Conway Henderson comments on the "cultural consensus" in this area, which has resulted in the voluntary compliance of member States with the European Convention. Henderson, "Human Rights and Regime: A Bibliographical Essay"(1988), 10 Human Rights Quarterly, p.539.

Committee expresses "its view" as to whether or not there has been a violation of the Political Covenant, it has no right to make a judicial determination of the dispute.

Article 2 of the Protocol reads "*individuals* who claim that any of their rights enumerated in the Covenant have been violated... may submit a written communication to the Committee for consideration"(emphasis added). In contrast to the European Convention of which Article 25 speaks of petitions from "any person, non-governmental organization or group of individuals," and Article 14 of the Racial Discrimination Convention,[30] which says "communications from individuals or groups of individuals", the words in the Protocol appear to exclude NGOs from filing communications.[31]

The Human Rights Committee may occasionally accept a representative appointed by the victim as the author of communications, provided there is a sufficient link between the victim and the author.[32] The case law of the Committee regards a close family connection as a genuine link. The Committee has not seen NGOs as having the required connection. In the case of *U.R* v. *Uruguay*,[33] the author, a member of Amnesty International, had been working on the alleged victim's situation for two and half years, and claimed to have the authority to act on behalf of U.R. because he believed "that every prisoner treated unjustly would appreciate further investigation of his case by the Human Rights Committee."[34]

---

[30]. GA Res. 2106A, 20 UN GAOR Supp. (No.14), 47 UN Doc. A/6014 (1965).

[31]. Schwelb, *supra*, n.21, p.182.

[32]. The Committee's Rule 90 (1)(b) reads that "the Committee may... accept to consider a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself." UN Doc. CCPR/C/3/Rev.1 (1979).

[33]. Communication no.128/82.

The Committee declared the communication inadmissible:

> The Committee had established through a number of decisions on admissibility that a communication submitted by a third party on behalf of an alleged victim can only be considered if the author justifies his authority to submit the communication.[35]

The Committee required further evidence justifying his acting on behalf of the alleged victim.

The Committee has denied that NGOs may author such communications. In the case of *A Group of Associations for the Defence of the Rights of Disabled and Handicapped Persons in Italy etc.* v. *Italy*,[36] the authors of the communication were an NGO (Coordinamento) and the representative of those associations who claimed that they were themselves disabled and handicapped or that they were the parents of such persons. The Committee declared:

> According to Article 1 of the Optional Protocol, only individuals have the right to submit a communication. To the extent, therefore, that the communication originated from 'Coordinamento', it has to be declared inadmissible because of lack of personal standing.[37]

The fact that NGOs are not given the right to submit petitions under the Optional Protocol has been justified; saying that "the victim should not be bound by the actions of an unrelated third party" and that there should be a "balance between flexibility and the need to prevent the Protocol system from being overburdened by a mass of unauthorized communication."[38]

---

[34]. GAOR, 38 Sess. Supp. 40, Report of the Human Rights Committee, p.239.

[35]. *Ibid.*

[36]. Communication no.163/1984.

[37]. GAOR, 39th See. Supp. 40, Report of the Human Rights Committee, p.198.

155 communications had been considered by the Committee by the July of 1992.[39] This impressive record is owing to the efforts of the Committee to act as a quasi-judicial body while avoiding political confrontation.[40] One of the most important decisions was the 1981 *Lovelace Case*,[41] in which it was alleged that the Canadian Indian Act, which provided that an Indian female who married a non-Indian male lost her Indian status,[42] violated various provisions of the Political Covenant.[43] The Committee agreed that the facts disclosed a breach of Article 27 of the Covenant, which guarantees the right of ethnic minorities to enjoy their own culture "in community with the other members of their group."[44] Canada

---

[38] Ghandhi, *supra*, n.21, p.217.

[39] UN Doc. A/47/40, 153.

[40] See Ghandhi, *supra*, n.21, pp.248-49; Manfred Nowak, "The Effectiveness of the International Covenant on Civil and Political Rights - Stocktaking after the First Eleven Sessions of the U.N. Human Rights Committee"(1980), 1 Human Rights Law Journal, pp.163-65.

[41] Communication no.R.6/24.

[42] Section 12 (1)(b) of the *Indian Act* (R.S.C. 1970, c.I-6) states that:

> the following persons are not entitled to be registered, namely... (b) a woman married a person who is not an Indian unless that woman is subsequently the wife or widow of a person described in section II.

There is no similar loss of status accorded an Indian male who married a non-Indian female.

[43] The provisions of the Covenant referred to were Article 23 (1) (protection of family), Article 23 (4) (the equality of spouses in marriage), Article 26 (the right to be equal before the law) and Article 27 (the right of minorities). For the text, see Brownlie, *Basic Documents of Human Rights* (Oxford: Clarendon Press, 3rd ed., 1992).

[44] Human Rights Committee Annual Report, 36 UN GAOR, Supp. (No.40) 111, UN Doc. A/36/40 (1981). See Anne F.Bayefsky, "The Human Rights Committee and the Case of Sandra Lovelace"(1982), 20 The Canadian Yearbook of International Law, pp.244-66.

subsequently passed legislation to comply with the Committee's view, removing from the Indian Act any provisions which discriminate on the base of sex.[45]

Nevertheless, one must concede that the above case is an exceptional one in which the member State spontaneously complied with a "view" that imposes no legal obligation on the State. The Human Rights Committee is not a judicial body. It has no power to enforce its view. As a result, the State Party concerned remains free to criticize or reject the views.[46]

d. Cooperation between NGOs and the Human Rights Committee

There exists a considerable field in which, for a lack of an appropriate United Nations authority, NGOs can take an active interest. NGOs can cooperate with the Human Rights Committee in three areas: (1) pressing for wider ratification of the Political Covenant and the Optional Protocol; (2) pressuring governments to accept the Committee's final statements; and (3) acting as a source of information.

First, regarding the number of State Parties to the instruments concerned, there is considerable room for expansion. As of January 1993, 114 States out of about

---

[45] See Canada Amendment in 1985 (S.C. 1985 c.27) to the *Indian Act*. In the third periodic report to the Committee, Canada stated: "An assessment is underway of the impact of the 1985 amendments to the Indian Act, which removed sexually discriminatory provisions and permitted the reinstatement of registration of certain individuals as status Indians.... Due to the significant numbers of people reinstated or registered, additional funding has been provided to Indian Bands." UN Doc. CCPR/C/64/Add. para.45 (1990).

[46] Sean MacBride criticizes the fact that U.N. Committees are not ideal bodies to be charged with the implementation because they are subject to political and ideological conflicts, suggesting the establishment of implementation machinery of a completely different type. MacBride, "The Strengthening of International Machinery for the Protection of Human Rights" in A.Eide and A.Schou ed., *International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium* (Stockholm: Almqist and Wiksell, 1967), p.162.

180 independent nations had become parties to the Political Covenant, and only 66 States had accepted the Optional Protocol. Only 37 States had accepted the Committee's competence to deal with inter-State complaints under Article 41 of the Covenant.[47] This provides NGOs with an opportunity to mobilize their widespread domestic groups in order to obtain wider ratification of the Covenant and the Protocol, including acceptance of the procedure for inter-State complaints.[48]

Second, as regards the non-binding nature of the Committee's final statements; viz., "general comments" in the reporting system and inter-State complaints, and "views" in individual communications, the Committee is limited in how it can enforce its statements. NGOs can help by mobilizing their constituents to build public opinion and put pressure on the governments concerned to accept the Committee's comments or views.

Third, NGOs as a source of information can contribute to the Committee's assessment of periodic State reports and to its consideration of individual communications.[49] Due to the lack of any express mandate in the Covenant, NGOs' information assistance has been conducted in an informal manner. This practice should be expanded in a systematic way such that the Committee can collect and evaluate data on human rights conditions throughout the world.[50] In dealing with concrete situations of human rights violations in a State, the timely and grass-roots information obtained by NGOs[51] is indispensable for the Committee in checking the accuracy and reliability of State reports. Ghandhi suggests that "[w]ithout a balanced, objective, and detailed assessment of the human rights situations in a country, the Committee can not have fruitful discussion with that country concerning possible improvements."[52] With a view to its effective functioning as a supervisory body in the Covenant, the Committee should broaden and promote channels of information with NGOs.

---

[47]. See Jean-Bernard Marie, "International instruments relating to Human Rights"(1993), 14 Human Rights Law Journal, p.62.

[48]. Richard Lillich and Michael Posner assert that U.S. NGOs should play an active role in the U.S. ratification of human rights treaties, in particular the two Covenants on Human Rights. Arych Neier et al, "Transitions in the Midst of Crisis: The Role of Non-governmental Organizations"(1990), 5 American University Journal of International Law and Policy, pp.976-77, p.985.

[49]. Weissbrodt argues that "there does not appear to be any reason why the Human Rights Committee... could not utilize NGO information in considering communications." Weissbrodt, *supra*, n.5, p.421, n.83.

2. The Commission on Human Rights

The Commission on Human Rights, being the principal U.N. body responsible for the promotion and protection of human rights, is authorized by the ECOSOC to deal with two implementing procedures which NGOs can utilize. One is ECOSOC resolution 1503[53] which deals with "communications," alleging the existence of "particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission." The other is ECOSOC resolution 1296[54] which allows NGOs having consultative status to participate in and present written and oral statements to the Commission on Human Rights or its subsidiary bodies.

---

[50] Some NGOs, like Amnesty International, have a monitoring network of observing human rights situations in various parts of the world. See e.g., Scoble and Wiseberg, "Amnesty International: Evaluating Effectiveness in the Human Rights Arena"(Sept.-Oct., 1976), Intellect, pp.81-82; P.L.Ray, Jr. and J.S.Taylor, "The Role of Non-governmental Organizations in Implementing Human Rights in Latin America"(1977), 7 Georgia Journal of International and Comparative Law, p.488.

[51] Commentators observe that one of the greatest strengths of NGOs is their capability to obtain news about human rights violations quickly through their informal information network. D.Weissbrodt and J.McCarthy, "Fact-Finding by International Nongovernmental Human Rights Organizations"(1981), 22 Virginia Journal of International Law, p.55.

[52] Ghandhi, *supra*, n.21, p.286.

[53] ECOSOC Res. 1503, 48 U.N. ECOSOC, Supp.6, at 9, U.N. Doc. E/4832/Add.1.para.7(c) (1970).

a. ECOSOC Resolution 1503

Under ECOSOC Resolution 1503,[55] in situations "which appear to reveal a consistent pattern of gross and reliably attested violation of human rights and fundamental freedoms", individuals and NGOs can submit communications to the U.N. organs.[56] In practice, however, it is extremely difficult for individuals to get any relief through this procedure, since it requires a gross and consistent pattern of violations which individuals will find very difficult to establish. This is especially true if the victim is still under detention or subject to a threat to life. Thus, NGOs have a major responsibility and are in a better position to make use of Resolution 1503.[57]

---

[54]. ECOSOC Res. 1296, 44 U.N. ECOSOC, Supp. 1, at 21, U.N. Doc. E/4548 (1968).

[55]. Prior to Resolution 1503, the Commission on Human Rights and the Sub-Commission were empowered only to examine and make studies "of situations which reveal a consistent pattern of violations of human rights as exemplified by... apartheid... and racial discrimination," and report and make recommendations to the Economic and Social Council. E.S.C. Re. 1235 [XLII], 42 U.N.ESCOR, Supp. (No.1) 17, U.N. Doc. E/4349 (1967).

Resolution 1235, though having a similar substantive scope to Resolution 1503, differs in the style of discussion, viz., the "public" procedure of Resolution 1235 in comparison with the "confidential" procedure of Resolution 1503. Comparative discussion of these two is beyond the scope of this paper, though it should be mentioned that the former resolution does not provide a complaint procedure directly accessible to individuals and NGOs. For their relationship, see U.N. Doc. E/CN.4/1237/Add.1 (1978). For the comparative discussion, see e.g., M.Bossuyt, "The Development of Special Procedures of the United Nations Commission on Human Rights"(1985), 6 Human Rights Law Journal, at 179; J.Moller, "Petitioning the United Nations"(No.4, 1979), 1 Universal Human Rights, at 59; F.Newman, "The New United Nations Procedures for Human Rights Complaints; Reform, Status Quo, or Chamber of Horror?"(1974), 34 Annales des Droit, at 129.

[56]. Communications may be addressed to any organ or body of the U.N., though it is recommended that they be addressed to the Secretary-General, in care of the Human Rights Centre, Geneva, Switzerland. The Centre initially processes the communications.

Resolution 1503's procedure has a complex and formal character, including various stages and conditions to arrive at the final step.[58] Because of this cumbersomeness, the procedure has often been criticized and its utility doubted.

(1) Problems in the Procedure

(a) Formality

The formal character is often criticized as "unduly lengthy"[59] or "time consuming."[60] Addressing the protracted nature of this procedure, Weissbrodt's research paper makes the following observation:

---

[57]. Since this procedure came into operation in 1972, NGOs have on many occasions submitted communications to organs. For instance, on May 19 and June 20, 1972, a group of NGOs - the International Commission of Jurists, the International League for the Rights of Man, the Federation Internationale des Droits de l'Homme, the International Association of Democratic Lawyers and Amnesty International - submitted the communication concerning Greece. Richard B.Lillich and Frank C.Newman, *International Human Rights: Problems of Law and Policy* (Boston: Little, Brown and Company, 1979), p.337.

[58]. Preliminary review of each communication is done by a five-member working group of the Sub-Commission which usually receives 20,000 - 25,000 communications per year (about 10 situations are transmitted to the Sub-Commission in any given year). In reviewing the initially screened cases, the Sub-Commission decides among the following: (1) to forward situations to the Commission; (2) to hold over a case for consideration at the following session; or (3) to request a working group to re-examine a communication. U.N. Centre for Human Rights, *Communication Procedures Fact Sheet* No.7, pp.6-7.

Regarding actions at the Commission's level, Resolution 1503 offers several alternatives: the Commission may (1) terminate consideration of a case; (2) continue it until a later session; (3) decide to initiate a "thorough study" of the situation, with or without the consent of the government concerned; or (4) make an investigation through an *ad hoc* committee with the consent of the government concerned (Res. 1503 para.6) In its annual report to ECOSOC, the Commission may recommend action regarding 1503 cases. ECOSOC may accept the recommendation, adopt its proposal, or draft recommendations for the adoption by the General Assembly.

[59]. M.Prasad, *supra*, n.21, p.457.

> The Commission failed to take action on the Sub-Commission decision to postpone consideration of all communications not received by the working group on communications at least five month prior to the working group's session in late July. This postponement will result in 1503 complaints that are more than one year old by the time the Commission on Human Rights considered any situations that are referred by the Sub-Commission. Such dated information may impede Commission deliberations under the 1503 procedure.[61]

Theo van Boven also sharply criticized the UN machinery in this respect: "[D]ue to... the inability or unwillingness of the Commission on Human Rights to act effectively, high expectations made way for strong disappointment."[62] In fact, since its establishment in 1970, the Commission has recommended "thorough study" only on one occasion[63] and transmitted only one case to the ECOSOC with a recommendation.[64] It has never recommended the use of an *ad hoc* committee.

---

[60]. A.Cassese, "Two United Nations Procedures for the Implementation of Human Rights" in J.C.Tuttle ed., *International Human Rights Law and Practice: The Role of the UN, the Private Sector, the Government, and their Lawyers* (Washington: American Bar Association, 1978), p.44.

[61]. Weissbrodt et al, "Major Developments in 1990 at the U.N. Commission on Human Rights"(1990), 12 Human Rights Quarterly, p.579.

[62]. van Boven, *supra*, n.16, p.124. In contrast to Boven's view, Bossuyt points out the merits of this protracting trend in the procedure. Stressing the importance of a dialogue between the U.N. and the government concerned, he states that: "[k]eeping a communication pending at the level of the Sub-Commission can be more effective for inducing the government to start a dialogue with the United Nations than forwarding the communication to the Commission, where it can be rejected as soon as it gets there." Bossuyt, *supra*, n.55, p.181.

[63]. The subject of the thorough study was Equatorial Guinea. For a full discussion, see R.Fegly, "The U.N. Human Rights Commission: The Equatorial Guinea Case"(No.1, 1981), 3 Human Rights Quarterly, at 34.

[64]. In 1980, for the first time, the Commission recommended that ECOSOC should express its regret that the government of Malawi has failed to "cooperate with the Commission on Human Rights in the examination of a situation said to have deprived thousands of Jehovah's Witness in Malawi of

(b) Confidentiality

Under the Resolution 1503 procedure, confidentiality is strictly preserved until the final stage - the recommendation from the Commission to ECOSOC - is reached. This requirement is designed to protect the independence of the members of UN subsidiary bodies from political pressure, since the examination of "gross human rights violations" is politically sensitive.[65]

From a purely legal point of view, the requirement is keenly criticized by Prasad in that: "[it] does not seem to serve the purpose of the [1503] procedure. It is against the concept of national justice and the established principles of due process in many countries."[66] Similarly, Frank Newman critically points out the drawbacks of confidentiality: authors of communications and their lawyers can not attend meetings of the U.N. bodies which consider communications; they are told nothing about the proceedings of the U.N. bodies handling the communications.[67]

The Commission, unlike the Sub-Commission which is composed of independent experts serving in their individual capacities, is a fifty-three member

---

their basic human rights and fundamental freedoms between 1972 and 1975, which failure constrains the Economic and Social Council to publicize the matter." 1980 U.N. ESCOR, Supp. (No.3) 3, U.N. Doc.E/1980/13, E/CN.4/1408 (1980).

[65] Weissbrodt et al, *supra*, n.61, p.579.

[66] Prasad, *supra*, n.21, p.458.

[67] Newman, *supra*, n.55. The effect may be worsened when the government accused is a member of the Commission. As Cassese alleges that:

> There will plainly be a differentiation between such governments and the authors of the communications against it. Likewise, the government in question will find itself in a better position than governments which are also accused but are not members of the Commission.

Cassese, *supra*, n.60, p.44.

organ composed of governmental representatives. As a result, the decision is inevitably influenced by political considerations. *The [London] Times* comments:

> "You can predict what will happen in the Commission by the political climate outside" said one observer, representing a non-governmental organization. "There is no genuine consideration of human rights. Everything refers to international politics."[68]

The Commission's vulnerability to political influence was disclosed in the case of the "dirty war" in Argentina from 1976 to 1983. Since 1976, NGOs had submitted numerous communications regarding this case to the Sub-Commission. After a series of attempts, the Sub-Commission finally referred the Argentine situation to the Commission in 1979.[69] However, due to skilful diplomacy by the Argentine representative to the U.N. with support from the U.S.S.R., the Commission kept the situation under consideration and was eventually unable to take any further action in accordance with Resolution 1503.[70]

One merit of the confidential procedure is that it may encourage constructive dialogue between the U.N. and the government concerned, while avoiding public criticism which often leads to an adverse reaction by the government criticized.[71] In the event of communications regarding the Korean minority in Japan,[72] for example, the 1503 confidential procedure led to a positive response by the Japanese government. After Japan declared to undertake legislative measures to rectify the situation,[73] the Commission terminated its consideration of the matter.

---

[68]. "Selective Silence on Human Rights" *The [London] Times* (27 Feb. 1975) at 6.

[69]. It is said that the protraction of the Sub-Commission's work during this period was encouraged by its Argentine Member, Mario Amadeo. M.Bartolomei and D.Weissbrodt, "The Impact of Factfinding and International Pressure on Human Rights Situation in Argentina, 1976-1983" in Newman and Weissbrodt ed., *International Human Rights: Law, Policy, and Process* (Cincinnati: Anderson Publishing Co., 1990), p.249.

[70]. During the meetings of the Commission, Argentine Ambassador to the U.N., Gabriel Martinez who was an experienced and effective advocate in using the U.N. procedures, played a substantial role in blocking action by the Commission on Human Rights. In addition, an alliance between Argentina and the U.S.S.R. made it more difficult for the U.N. to take action requiring consensus. Trade relations between them significantly increased after the U.S. imposed a grain embargo in 1979 against the U.S.S.R. The U.S.S.R. and its allies thus also supported Argentina in resisting the U.N. action. Bartolomei and Weissbrodt, *ibid*., p.250.

However, confidentiality undermines or overlooks cases that demand immediate actions. Consequently, NGOs tend to suspect the worth of this procedure and to seek more effective and timely measures.

b. Written and Oral Statements

ECOSOC resolution 1296 grants NGOs having general and special consultative status (Category I and II)[74] the right to present written and oral statements on certain subjects during sessions of the Commission on Human Rights or its subsidiary organs, including the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the working group of the Sub-Commission. Some NGOs have skilfully utilized opportunities for the written and oral presentation during the discussion of the human rights issues, aimed at "mobilizing shame" in the U.N. forum.

---

[71] Newman and Weissbrodt, *supra*, n.69, p.123. In the subsequent practice of the Commission, however, the confidentiality in Res. 1503 procedure has been loosened gradually. In 1978, the Commission began to announce the names of the countries subject to 1503 discussion. In 1983, the Commission announced whether it had decided to keep matters under consideration or to terminate consideration.

[72] The communications were filed by the International Human Rights Law Group (U.S. based NGO), were referred to the U.N. Commission on Human Rights in 1981. See Yuji Iwasaka, "Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law"(1986), 8 Human Rights Quarterly, pp.31-79. The International Commission of Jurists (ICJ) has also expressed concern about this issue. See "Japan's Denationalization of the Korean Minority" (1982), 29 The ICJ Review, pp.28-34.

[73] A series of legal change were undertaken: the revision of the Immigration Control Order in 1982, which has allowed many Koreans to obtain permanent residency and eliminated several grounds for deportation; the revision of the Nations Pension Law in 1982 and the momentous judgement the Tokyo High Court in the Korean national pension case in 1983; the revision of the laws concerning to child allowance in 1982; the revision of the Alien Registration Law in 1982; the enactment of the law allowing public universities to hire aliens in 1982; and the revision of the Nationality Law in 1985. Iwasaka, *supra*, n.72, p.179.

[74] For the category of consultative status, see Chapter II, pp.81-2.

At the 1974 session of the Commission on Human Rights, one oral presentation by the representative of two NGOs[75] triggered an unprecedented action by the Commission. The presentation regarding the situation in Chile prompted an extraordinary telegram from the Commission to the Chilean government.[76] The Commission then directed the Sub-Commission to request NGOs enjoying a consultative status to submit reliable information regarding the mass violation of human rights in Chile.[77] On the basis of the submitted information, the Commission formed a working group for an official inquiry into the alleged situation in Chile.[78] The series of actions by the Commission and its subsidiary bodies led to the adoption of the General Assembly's resolution which condemned the constant and flagrant violations of human rights, deploring Chile's failure to cooperate with the working group and raising the possibility of humanitarian and legal aid to victims.[79]

---

[75]. The International Association of Democratic Lawyers and the Women's International Democratic Federation. See U.N. Doc. E/CN.4/SR. 1271 and 1274 (1974).

[76]. By sending the telegram to the government of Chile on 1 March 1974, the Commission on Human Rights expressed concern about violations of human rights in that country and called particular attention to the cases of five prominent detainees. E.S.C. Res.1873, 56 U.N. ESCOR, Supp.(No.5) at 56-57, U.N. Doc.E/5464, E/CN.4/1154 (1974).

[77]. Sub-Commission on Prevention of Discrimination and Protection of Minorities Res.8 (XXCII) U.N. Doc. E/CN.4/1160, E/CN.4/Sub.2/354, at 53-54 (1974).

[78]. Human Rights Commission Res.8 (XXXI), 56 U.N. ESCOR, Supp. (No.4) 66, U.N. Doc. E/5625, E/CN.4/1179 (1975).

Another case successfully led by NGO initiatives is that of reform of the Japanese Mental Health Law. At the 1984 session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, a representative of the International League for Human Rights (I.L.H.R.) made an oral submission concerning the treatment of the mentally ill in Japan, asking the Sub-Commission to review the situation.[80]

The negative response by the Japanese observer[81] at the session led to further actions by NGOs. The I.L.H.R. sent a letter to the Prime Minister, criticizing the response; meanwhile the issue was reported by the national and international media, and triggered a debate in the Diet.[82] A NGO fact-finding mission visited Japan.[83] At the 41st session of the Sub-Commission in 1985, this issue was on the agenda again,[84] when the Japanese representative, conceding the inadequacy of the regulations concerned, declared an intention to initiate legal reform for improving the human rights of mental patients.[85] The above two cases are good examples of NGOs successfully utilizing their formal status in the U.N.

---

[79] GA Res. 3448, on November 22 1976, U.N. Doc. A/C.3/31/L. 26/Rev.1 (1976). Chile released several hundred prisoners in November 1976. At the 1977 session of the Commission, an observer from Chile admitted the authority of the Commission to deal with all violations of human rights. 63 U.N. ESCOR, Supp.(no.6) 35, U.N. Doc.E/5927 E/CN.4/1257 (1977). However, a year later Chile changed its stance: by opposing a study by the U.N. regarding the human rights situation in Chile and claiming the U.N. resolution was an infringement of Chilean sovereignty. 1978 U.N. ESCOR, Supp. (No.4) 15, U.N. Doc. E/1978/34, E/CN.4/1292 (1978).

[80] The testimony was based on a report prepared by the Japan Civil Liberties Union (J.C.L.U.), the Japanese affiliate of the I.L.H.R.. The J.C.L.U. report found that mental illness has become Japan's most prominent medical problem, and that 80 percent of all hospitalizations in mental institutions are compulsory. It also referred to the inadequacy of the Japanese Mental Health Act which lacked provisions for any judicial decision in the case of an involuntary detention, or any right of appeal against it, or any automatic periodic judicial review regarding the extension of the patient's confinement. Human Rights Internet, "Japan: The Treatment of the Mental Ill"(1984), 10 Human Rights Internet Reporter, p.224.

[81] The Japanese government denied those allegation at the session, saying that: (1) serious abuses constituted no more than a few isolated cases; (2) the compulsory hospitalization figures were 12 percent; (3) legal procedures for detention were not violating international law; and (4) administrative measures to supervise mental hospital were satisfactory. Etsuro Totsuka, "The Changing Face of Mental Health Legislation in Japan"(1989), 42 The ICJ Review, p.75.

c. Criticism against NGO Interventions

NGO intervention in U.N. bodies may on the one hand produce a significant improvement in the situation of human rights violations. On the other hand, it contains a risk that NGOs would be faced with counter-attack by the governments criticized. In testifying about violations of human rights in a country, NGOs tend to become critics of the violaters, who in most cases are governments. If governments believe that they are threatened by the criticism of NGOs, they will react adversely. In such cases, governments, accusing the NGO of engaging in "politically motivated acts," may threaten to suspend or withdraw the consultative status of the NGO on the basis of Resolution 1296 para. 36 (b).[86]

---

[82] Totsuka, *ibid.*

[83] The joint mission was composed of the International Commission of Jurists (I.C.J.) and the International Commission of Health Professionals (I.C.H.P.). Totsuka, *ibid.*, p.75. See the I.C.J., *Human Rights and Mental Patients in Japan: Report of a Mission on Behalf of the International Commission of Jurists and the International Commission of Health Professionals* (Geneva: I.C.J., 1985).

[84] The I.C.J., the I.L.H.R. and the Disabled Peoples' International (D.P.I.) made an oral presentation, based on the report of the fact-finding mission in Japan.

[85] Totsuka, *supra*, n.81, p.75. The new law, called the Mental Hygiene Act, was approved by the Diet in 1987 and came into force on 31 July 1988. *Ibid.*, p.78.

NGOs have on many occasions come under sharp attacks from State members. For example, at the 1968 session of the Commission on Human Rights, the U.S.S.R. delegation condemned the Jewish organizations which were speaking on behalf of Soviet Jews, accusing them of interfering in the internal affairs of member States and of organizing campaigns of propaganda and slander against the Soviet Union.[87] At the same time, the International Commission of Jurists, the International League for the Rights of Man (currently called the International League for Human rights), and the International Federation for the Rights of Man became targets of the U.S.S.R. which urged the withdrawal of their consultative status.[88]

In response to accusations by the member States the Committee of Non-

---

[86]. Article 36 para. (b) in Resolution 1296 reads:

> The consultative status of non-governmental organizations with the Economic and Social Council and the listing of those on the Roster shall be suspended up to three years or withdrawn in the following cases;
>
> > (b) If the organization clearly abuses its consultative status by systematically engaging in unsubstantiated or politically motivated acts against State Members of the United Nations contrary to and incompatible with the principles of the Charter.

Supra, n.54.

A United Nations committee's report (released on May 28, 1993), which has sharply criticised the Canadian government for allowing poverty and homelessness in the county, has led to a great controversy in Parliament with suspicion about the work of two Canadian NGOs (the National Anti-Poverty Organization and the Charter Committee on Poverty issues) associated with food-bank activists. See the articles related to "the U.N. Poverty Report on Canada" *The [Toronto] Globe and Mail* (29 May 1993) A1 and 2, (31 May 1993) A3, (1 June 1993) A4, and (9 June 1993) A1 and 5.

[87]. U.N. Doc. E/SR.1584, pp.2 and 7; E/4647; and E/4799. In addition, the Libyan representative summed up the Arab case against the Jewish organizations, including the World Jewish Congress (W.J.C.) and the Coordinating Board of Jewish Organizations (C.B.J.O.), by stating that:

> [they]... were identified with one Government which was hostile to other Member States and that they had abused their consultative status by conducting a systematic political campaign against those Member States.

U.N. Doc. E/4647, Annex II, p.3.

[88]. U.N. Doc. E/SR.1583, 22 May 1968, p.6; and E/SR.1582, p.5.

Governmental Organizations on ECOSOC initiated an investigation by questionnaire of NGOs, which focused on covert government financing of NGOs, involvement of NGOs in South Africa, the relationship of NGOs with Zionism, and criticism by NGOs of human rights violations in socialist countries.[89] No NGO lost its consultative status as a result of this investigation, though the exercise was undoubtedly designed to make NGOs more cautious in their criticism.[90]

A strong nationalist reaction against NGO intervention came at the 1975 session of the Commission on Human Rights. The representative of the World Conference of Religion and Peace (W.C.R.P.) addressed the question of religious persecution naming Brazil, Chile, Czechoslovakia, Egypt, Indonesia, Pakistan, the Philippines, Turkey and Zaire as offenders. Immediately after the W.C.R.P.'s delivery, seven State delegations (Egypt, Pakistan, the Philippines, Soviet Union, Syria, Turkey and Zaire) unleashed a storm of criticism, stating that:

> this organization had seen fit to make unfounded and slanderous accusations against member states and expressed the view that such statements constituted an abuse of the privilege accorded to nongovernmental organizations to participate in the deliberations of the Commission.[91]

Subsequently the Egyptian delegation submitted a formal statement to the Commission:

---

[89]. U.N. Doc. E/C.2/ST.224 (1968); U.N. Doc. E/2362 (1968).

[90]. See Ascher, "The Economic and Social Council Reviews Consultative Status of Non-Governmental Organizations"(1968), 20 Int'l A., at 27.

[91]. UN Doc. E/CN.4/1179 at para.66 (1975). See Homer A.Jack, *The Human Rights Commission at Geneva* (New York: World Conference on Religion and Peace, 1975).

> We are extremely concerned about the abuse of freedom of speech practised by some representatives of nongovernmental organizations. This particular statement recently delivered by the World Conference on Religion and Peace should not appear in the summary records of this Commission. Indeed, its status should be restricted by the Economic and Social Council. During the past two sessions this organizations has made such statements. Their status should be reconsidered in accordance with ECOSOC Resolution 1296(XLIV).[92]

At a closed meeting of the Commission, 16 nations proposed a draft resolution which was intended to urge the Committee on NGOs to undertake a careful examination of NGO activities.[93] In discussing the draft resolution in 1976, ECOSOC made radical amendments in the terms so that the ultimate effect amounted to little more than a reaffirmation of Resolution 1296, viz., the exclusion of systematic, unsubstantiated, or politically motivated acts.[94] In sum, NGOs were merely reminded that they had to be careful.[95]

The 1977 session of the Social Committee of ECOSOC was again the forum for arguments in favour of limiting the participation of NGOs. Argentina asserted that certain NGOs had abused their status out of political motivation, citing as an example that a person who spoke on behalf of the NGOs was a member of Pax Romana which was allegedly the Argentina branch of an international terrorist movement. It claimed that the person, who had addressed the 29th session of the

---

[92]. Jack, *ibid.*, p.7.

[93]. U.N. ECOSOC, Official Record, Fifty-eight Session, *Commission on Human Rights: Report on the Thirty-first Session (3 February - 7 March 1975)*, Supp. No.4 (E/5635), pp.1-2.

[94]. E.S.C. Res.1919 (LVIII), 58 U.N. ESCOR, Supp. (No.1) 8, U.N. Doc. E/5683 (1976).

[95]. Menno Kamminga and Nigel S.Rodley, "Direct Intervention at the UN: NGO Participation in the Commission on Human Rights and Its Sub-Commission" in Hurst Hunnum ed., *Guide to International Human Rights Practice* (Philadelphia: University of Pensylvania Press, 1984), p.194.

Sub-Commission (on 19 August 1976) on behalf of the International Commission of Jurists, was "the same person" who addressed the 33rd session on the Commission (on 11 March 1977) on behalf of Pax Romana. Argentina requested ECOSOC to determine whether the NGOs concerned had made their consultative status subject to suspension or withdrawal.[96]

Argentine efforts were supported by the representatives of Brazil, Bolivia, Iraq, Venezuela, the Soviet Union, Ukraine, Iran, and the observer for Chile. The debate ended with an "appeal" by ECOSOC to NGOs to "exercise particular care" in the selection of their representatives.[97]

Some U.N. personnel are also suspicious of the motives and reliability of NGOs. This suspicion stems from the fact that some NGOs tend to be activist and their work is often of uneven quality: some NGOs lack adequate resources and staff and are not competently represented at the U.N.[98] In the context of Resolution 1503, the NGO's "discretion" and "carelessness" in dealing with human rights complaints is criticized even by NGO colleagues. According to an interview of NGO representatives by Chiang, "[s]ome NGOs' representatives agree that some had failed to observe the confidentiality requirements when submitting communications concerning human rights violations, and had cited newspaper stories without careful investigation, verification, and documentation."[99]

---

[96]. U.N. Doc. E/C.2/R.50/Add.1 (Restricted), pp.206. Besides the above two NGOs, Argentina criticized the activities of the International Federation for Human Rights and the International University Exchange Fund. *Ibid*. Those four NGOs responded forcefully to Argentine charges. See Chiang, *supra*, n.6, pp.195-96.

[97]. U.N. Doc. E/AC.7/SR.805, pp.8-9; E.AC.7/SR.806, 5 May 1977, pp.2-6; and E/AC.7/SR.808, 6 May 1977, pp.8-10. See also Kamminga and Rodley, *supra*, n.95, p.195.

[98]. Weissbrodt, *supra*, n.5, p.419.

NGO interventions in the Commission and its Sub-Commission require careful preparation supported by substantial and objective data. Suggestions by Weissbrodt and McCarthy are instructive to all NGOs:

> In order to inspire corrective efforts by governments, human rights organizations must demonstrate that their factual statements are true and thus constitute a reliable basis for remedial government policy. Human rights organizations... must pursue reliability through the use of generally accepted procedures and by establishing a reputation for fairness and impartiality.[100]

Such interventions always have a risk of government reaction since "[g]overnments do not wish to be reminded that they are ignoring the fundamental rights of their citizens... particularly... in the openness of international debate."[101] Carelessness may be counter-productive, leading to suspicions that might eventually restrict NGO access to U.N. bodies. Well-prepared documentation and discreet intervention is essential for NGOs when they utilize and thereby vitalize the machineries under the U.N. organs which otherwise tend to be exercised in "sterile diplomatic games played by persons with little knowledge of the facts."[102]

---

[99]. Chiang, *supra*, n.6, p.198.

[100]. D.Weissbrodt and J.McCarthy, *supra*, n.51, pp.5-6.

[101]. Weissbrodt, *supra*, n.5, pp.410-11.

[102]. Kamminga and Rodley, *supra*, n.95, p.198.

3. The Recent United Nations Approach and Actions

Due to recent dramatic changes in the international political climate, the role of the United Nations has been brought into focus for the maintenance of international peace and security, such focus having strong human rights implications. The current Security Council's actions in the Gulf War 1991 and internal conflicts have taken an unprecedented approach to collective security and brought a new perspective to international human rights protection. Consequently, the Council is becoming instrumental in the protection of fundamental human rights, in particular the right to life. As it is the only organ which can make binding decisions in the U.N., the Security Council has enormous potential to perform effective operations in this field.

a. The Security Council's Approach to the Implementation of Humanitarian Law

In the realm of humanitarian law, in treaty form, consisting of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977,[103] implementation is via the Protecting Powers,[104] which are appointed by the Parties to the conflict. In the absence of Protecting Powers, the following "substitutes" are available under the Geneva Conventions of 1949:[105] "an organization which offers all guarantees of impartiality and efficacy,"[106] "a neutral State or such an organization,"[107] or "a humanitarian organization, such as the International Committee of the Red Cross."[108] For its first twenty years, the U.N. played no particular role in the implementation of humanitarian law, seemingly incapable of preventing armed conflicts. The U.N. reluctance to take an initiative stems from the fundamental principle of non-use of force against the territorial integrity and political independence of States as enunciated in Article 2 (4) of the U.N. Charter.[109] A major reason for this is the political tension between East and West, whereby the vetos of permanent members of the Security Council have hindered "enforcement actions" empowered by Chapter VII of the U.N. Charter.[110]

---

[103] See *supra*, Chapter II, pp.64-6.

[104] A "Protecting Power" is a "State instructed by another State (known as the Power of origin) to safeguard its and those of its nationals in relation to a third State (known as State of residence)." Jean Pictet, *Commentary to the Geneva Conventions of August 1949 Vol.1 - Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952), p.86.

Since the adoption of Resolution 237 of 1967, relating to the Six Days War in the Middle East,[111] the Security Council has frequently relied on provisions of the Geneva Conventions which, imposing a binding obligation on State Parties, provide a solid legal basis for its decisions.[112] Nevertheless, most of its decisions have for many years merely called for respect for humanitarian law.

---

[105] For the text of the Geneva Conventions of 1949, see D.Schibdler and J.Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Boston: Martinus Nijoff Publishers, 3rd ed., 1988).

[106] Common article 8, para.1 of the First, Second, and Third Geneva Conventions and article 9 of the Fourth Geneva Convention.

[107] Common article 8, para.2 of the First, Second, and Third Geneva Conventions and article 9 of the Forth Geneva Convention.

[108] Common article 8, para.3 of the First, Second, and Third Geneva Conventions and article 9 of the Forth Geneva Convention.

[109] Article 2 (4) reads:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

[110] Under Chapter VII, the Security Council may act and decide upon enforcement measures when it deems that a situation or conflict constitutes a threat to the peace, breach of the peace or act of aggression.

The series of resolutions concerning the Gulf crisis triggered an innovative approach. The Council urged the release of all hostages,[113] and requested that all distribution of food be undertaken by humanitarian organizations, such as the U.N. special agencies and the International Committee of the Red Cross.[114] The Council also demanded that Iraq cease and desist from taking third-state nationals hostage, mistreating and oppressing Kuwaiti and third-state nationals and any other actions which violate, *inter alia*, the Fourth Geneva Convention of 1949.[115]

With regard to the invasion of Kuwait by Iraq, the Security Council for the first time dealt with the consequences of Iraq's violation of humanitarian law. In Resolution 670, the Council affirmed that Iraq was bound to comply fully with all terms of the Fourth Geneva Convention and, in particular, that Iraq was "liable under the Convention in respect of grave breaches committed by it, as [were] individuals who commit[ted] or order[ed] the commission of grave breaches."[116] By calling for collection of information on and evidence of Iraq's breaches of the Geneva Conventions, the resolution points to the possibility of setting up an International Military Tribunal on the liability of Iraq, although nothing has been done to give effect to this.[117]

---

[111] In Resolution 237, the Security Council recommended "to the Government concerned the scrupulous respect of humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949." S.C. Res.237, U.N. SCOR, 1361st mtg.(June 14, 1967).

[112] See e.g., Christiane Bourloyannis, "The Security Council of the United Nations and the Implementation of International Humanitarian Law"(1992), 20 Denver Journal of International Law and Policy, pp.340-342; T.van Boven, "Reliance on Norms of Humanitarian Law by United Nations Organizations" in A.J.M.Delissen and G.J.Tania ed., *Humanitarian Law of Armed Conflict: Challenges Ahead* (Massachusetts: Kluwer Academic Publishers, 1991), pp.495-513.

[113] S.C. Re.664, U.N. SCOR, 2937th mtg. (Aug.18, 1990).

[114] S.C. Re.666, U.N. SCOR, 2929th mtg. (Sept.13, 1990).

[115] S.C. Re.674, U.N. SCOR, 2951st mtg. (Oct.29, 1990).

In addition, by granting a special role to the I.C.R.C., the Security Council strengthened the measures for implementing humanitarian law.[118] The Council's Resolutions have advanced the cooperative system of the U.N. and the I.C.R.C., while having brought into focus humanitarian intervention under the U.N. regime.

b. Humanitarian Intervention on the Authority of the United Nations

Humanitarian intervention was once regarded as part of customary law,[119] but the subsequent practice of international organizations and the World Court has viewed it as illegal.[120] The principle of non-intervention, which stems from the principle of the sovereignty and equality of states, is stipulated in Article 2 (7) of the Charter: "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State." The Article, however, provides an important exception, stating that "this principle shall not prejudice the application of enforcement measures under Chapter VII." If the Security Council "determines the existence of any threat to the peace, breach of peace, or act of aggression,"[121] the matter does not constitute a matter "essentially within domestic jurisdiction." Under Chapter VII, thereby, the Council may authorize the intervention in terms of collective security.

---

[116] S.C. Re.670, U.N. SCOR, 2943rd mtg. (Sep.25, 1991).

[117] See L.C.Green, "Iraq, the U.N. and the Law"(1991), 29 Alberta Law Review, pp.570-571.

[118] For example, under the auspices of the I.C.R.C.(Res.686, on Mar.2, 1991), the Council demanded that Iraq arrange for immediate access to and release of all prisoners of war. It encouraged cooperation between the U.N. and the I.C.R.C. for humanitarian aid, such as for the distribution of food stuffs in Iraq and Kuwait (Res.666, on Sep.13, 1990), and the repatriation of Kuwaiti and third country nationals after the Gulf War (Res.687, on April 3, 1991). It also requested Iraq to allow immediate access by international humanitarian organizations to provide humanitarian aid for oppressed minorities (Res.688, on April 5, 1991).

[119] See *supra*, Chapter II, p.56, n.38.

In the determination of threats to peace and security, the Security Council had not regarded human rights issues, (with a few exceptions which saw racial considerations),[122] as a qualifying factor. In addition, apart from the legal basis in

---

[120] The principle of non-intervention has been confirmed in numerous resolutions, declarations and conventions adopted by international organizations and also the World Court, e.g., the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. G.A. Res.2131, U.N. GAOR, 20th Sess., Supp. No.14, at 12, U.N. Doc. A/6220 (1965), the 1970 Declaration on Principles of Law concerning Friendly Relations and Cooperation Among States. G.A. Res.2625, U.N. GAOR, Supp. No.18, U.N. Doc. A/8018 (1970). For the World Court decisions, see *Nicaragua* v. *U.S.* [1986] I.C.J. Report 14, at 100. The court said, "in view of the generally accepted formulations, the principle of [non-intervention] forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States." *Ibid*; in the *Corfu Channel Case*, the court stated: "the alleged right of intervention as the manifestation of the policy of force, such as has, in the past, given rise to most serious abuses and such as can not... find a place in international law." *Corfu Channel Case* [1949] I.C.J. Report 4, at 35.

[121] The UN Charter article 39.

[122] By the end of 1990, only two cases triggered U.N. enforcement measures. One was an economic sanction and oil embargo against Southern Rhodesia in Resolution 253 of 1968. The other was an arms embargo against South Africa in Resolution 418 of 1977. Similar sanctions were imposed on the Federal Republic of Yugoslavia by Resolution 757 (on 30 May 1992).

Chapter VII, the practice of the Council in general showed a reluctance to get involved in cases of human rights violations, even when there were appeals by governments and NGOs.[123]

Resolution 688,[124] adopted by the Security Council on April 5, 1991, brought a breakthrough in the former practice of the Council. In this resolution, by characterizing the repression of the Kurdish people by the Iraqi government as a threat to international peace and security, the Council requested Iraq to end the repression of its civilian population, particularly Iraqi Kurds, and to allow immediate access by international humanitarian organizations to all those in need of assistance in its territory. With regard to the resolution, it is said that:

> [t]he newly established basic consensus among the Soviet Union, the United States, and the other great western powers allowed for measures to be taken inside a sovereign state, to protect minority groups from massive human rights violations.[125]

This consensus is a product of the termination of the Cold War which had frequently paralysed the Security Council's action for its first 40 years.[126] The resolution dictates that even without the consent of the State concerned, the U.N. is not prohibited from intervening to provide humanitarian relief.[127] Through this decision, the notion of a threat to international peace and security was broadened,[128] and the Council utilized a restrictive interpretation of non-intervention principle in Article 2 (7) such that gross and massive violation of human rights no longer constitutes a matter essentially within the domestic jurisdiction of States.[129]

---

[123]. For example, On 29 January 1969, the U.S. Ambassador to the U.N. wrote a letter to the President of the Security Council concerning the public execution of 14 persons convicted for espionage in Iraq. See Lillich and Newman, *supra*, n.57, pp.18-20. On 8 April 1979 the Secretary-General of Amnesty International urged the U.N. Secretary-General in a letter to use Article 99 of the Charter to convene a meeting of the Security Council that would consider measures to stop a wave of political executions and murders across the world. See B.G.Ramcharan, *The Concept and Present Status of the International Protection of Human Rights: Forty Years after the Universal Declaration* (Dordrecht: Martinus Nijhoff Publishers, 1989), pp.101-102.

[124]. S.C. Res.688, reprinted in 30 *International Legal Materials* (1991), at 858.

[125]. Jost Delbruck, "A Fresh Look at Humanitarian Intervention under the Authority of the United Nations"(1992), Indiana Law Journal, p.888.

[126]. See *Preventive Diplomacy, Peace-making and Peace-keeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992* , U.N. Doc. A/47/277, S/24111, 17 June 1992, p.4. The U.N. was rendered powerless to deal with over

c. Appraisal of the United Nations Approach

While being primarily for the maintenance of international peace and security,

---

100 major conflicts of the world because of vetoes - 279 of them - cast in the Security Council. *Ibid.*, para.14-15.

[127] This stand was subsequently confirmed and strengthened by Resolution 770 in August 1992, which relates to conflicts in the former Yugoslavia. The resolution recognized that "the situation in Bosnia and Herzegovina constitutes a threat to international peace and that provision of humanitarian assistance in Bosnia and Herzegovina is an important element in the Council's efforts to restore international peace and security in the area." The Security Council demanded through the resolution that "all parties and others concerned take the necessary measures to ensure the safety of the U.N. and other personnel engaged in the delivery of humanitarian assistance." For the full text of the resolution, see "The UN and former Yugoslavia: Selected Resolutions"(1992), 4 International Journal of Refugee Law, pp.400-1.

[128] This trend is continuing in the Security Council. For example, Security Council Summit Declaration, issued on January 31, 1992, stated:

> The absence of war and military conflicts amongst states does not in itself insure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.

"Security Council Summit Declaration: New Risks for Stability and Security" *The [New York] Times* (1 Feb. 1992) A4.

[129] See Delbruck, *supra*, n.125, p.890. In examining the U.N.'s record on the protection of human rights, Felix Ermacora concluded that "gross violations or consistent patterns of [human rights] violations... [were] no longer essentially within the domestic jurisdiction of States, and therefore the principle of non-intervention [was] not applicable." Ermacora, "Human Rights and Domestic Jurisdiction (Article 2, sec.7, of the Charter)"(1968), 124 Recueil Des Cours bk.II, p.436.

the recent actions of the Security Council have encouraged the international recognition of human rights, in particular, in emergencies endangering large numbers of human lives. This tendency of the Council is stimulated by the recent emergence of two ideas. The first idea is a growing understanding that human rights protection necessitates social stability on both international and internal levels, which are frequently interactive. The human rights dimension is now recognized as, in the words of van Boven, "an integral part of the peace process in the countries concerned."[130] Internal conflicts often cause large-scale human suffering and consequently bring about massive flows of refugees which create social pressure in neighbouring countries and a threat to their peace and stability. In this regard the previous U.N. Secretary General, Perez de Cuellar, properly observed:

> Today, in a growing number of cases, threats to national and international security are no longer as neatly separable as they were before. In not a few countries, civil strife takes a heavy toll on human life and has repercussions beyond national borders.[131]

The second idea is a growing consensus that humanitarian assistance, such as the delivery of food and medicine, is a justifiable way to get access beyond a State's borders to people whose lives are endangered.[132] In the case of Nicaragua, the

---

[130]. Theo van Boven, "The Security Council: The New Frontier"(1992), 48 The ICJ Review, p.20.

[131]. *Report of the Secretary-General on the Work of the Organizations* (1990), U.N. Doc. A/45/1, sec.IV.

[132]. See GA Res.45/100, on Dec.14, 1990; GA Res. 46/182, on Dec.19, 1991. After the adoption of Resolution 688, the U.S. Congress introduced a bill asking the U.S. government to take the initiative for the drafting and negotiation of an international convention on the right to food. See George D.Moffett III, "US Congressman Pressure to Outlaw Denial of Food" *The Christian Sci.Monitor* (5 June 1991) at 6.

However, some countries in the developing world and, in particular, China persist in supporting the principle of non-interference in the internal affairs of states, opposing the intrusive designs of the

International Court of Justice affirmed that distribution of humanitarian aid, regardless of State consent, was not unlawful intervention.[133]

A core value underlying these new understandings is a growing international concern for human rights which, in the process, seeks some limitation to state sovereignty such that, in the words of Scheffer, "governments can no longer hide behind the shield of sovereignty and assault the human rights of their own people."[134]

Under its sovereignty, a State has the duty to protect the fundamental rights of the individual citizens.[135] At the very least, this encompasses the right to life. In emergencies leading to massive human suffering and deprivation, where the government is unable or unwilling to meet humanitarian needs, U.N. humanitarian

---

West's "New World Order." See "United Nations Security Council Summit Opening Addresses by Members (hereafter Opening Address)," Fed.News Serv.,(on Jan.31, 1992), at VP-5-1, pp.3-4.

[133] The court stated that "[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law." Military and Paramilitary Activities in and against Nicaragua, *Nicaragua* v. *U.S.*, *supra*, n.120, para.242.

[134] David J.Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention"(1992), 23 University of Toledo Law Review, p.283. In this respect, the statement of the U.N. Secretary-General at the U.N. Security Council Summit on January 31, 1992, deserves to be quoted:

> State sovereignty takes a new meaning in this context. Added to its dimension of rights is the dimension of responsibility, both internal and external. Violation of state sovereignty is and will remain an offence against the global order, but its misuse also may undermine human rights and jeopardize a peaceful global life.

Supra(Opening Address), n.132, at VM-5-2.

[135] See e.g., B.G.Ramcharan, "Strategies for the International Protection of Human Rights in the 1990s"(1991), 13 Human Rights Quarterly, p.162; Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons Ltd., 1950; reprinted by Connecticut: Archon Books, 1968), p.68; Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: Transnational Publication, 1988), p.15. On the basis of natural rights theory, Fernando Teson stresses the duty of the States because "the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens." *Ibid.*

intervention, aimed at humanitarian relief, may be justified to complement a State's responsibility to sustain the lives of its citizens. This type of assistance is not intended to infringe on the territorial integrity and political independence of the State. Thus, such action is not against the principle of non-intervention in Article 2 (4) or (7) of the U.N. Charter.

In view of present international political circumstances, the Security Council will probably play a more prominent role in human rights and humanitarian matters by legitimizing humanitarian intervention. The statement of U.N. Secretary-General Boutros Boutros-Ghali, in his report to the 47th session of General Assembly on 17 June, 1992, indicates the new world order which the U.N. should seek to achieve:

> Respect for [State's] fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world.[136]

The Council will hopefully find broader ways to assist in more effective international protection of the most fundamental human rights, while seeking a proper balance[137] with the principle of State sovereignty.

---

[136] *Supra*, n.126, p.5, para.17.

[137] For discussion of the criteria regarding the permissibility of the current cases of humanitarian intervention, see e.g., Ved P.Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti - Revisiting the Validity of Humanitarian Intervention under International Law - Part I"(1992), 20 Denver Journal of International Law and Policy, pp.305-334.

C. Implementation outside of Inter-Governmental Machineries

The United Nations has made efforts at giving teeth to its implementing machineries for the protection of human rights. In certain limited areas, such as the "gross and flagrant violation of human rights," and "threat to international peace and security" in particular, the U.N. has attempted to establish its enforcement mechanisms. However, with regard to the human rights field as a whole, there seems to be little impetus at the U.N. to develop meaningful ways of enforcing human rights objectives.[138] Cumbersome procedures and dominance by governments make it difficult for the U.N. to act and respond as needed to restrain human rights abuses in a timely manner.[139]

1. Public Opinion

Given the present state of the institutional protection of human rights, public opinion should not be overlooked by NGOs. As Humphrey says, "an educated world public opinion may indeed be the ultimate sanction of the international law of human rights."[140] The importance of public opinion has also been recognized in the U.N.: U Thant, the former Secretary-General, stated in his 1971 report on the work of the U.N.:

---

[138] Howard Tolley, Jr. observes a conscious resistance on the part of State Parties against any encroachment from the U.N.:

> as the United Nations has moved from standard-setting to the implementation of rights, member states have grown stingy with stuff and money. As independent experts on the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities have sought secret votes, on-site visits, and the creation of a United Nations High Commissioner for Human Rights, state representatives have fought just as hard to resist a supernational mechanism for the enforcement of rights.

Tolley, *The U.N. Commission on Human Rights* (Boulder, Colorado: Westview Press, 1987), pp.216-17, pp.182-86, pp.163-66.

[139] Forsythe suggests that "the bulk of UN activities in human rights is not designed to produce short-term change" because U.N. human rights bodies, except for the Security Council, have no authority to bring about direct protection. Forsythe, "The United Nations and Human Rights, 1945-1985"(1985), 100 Political Science Quarterly, pp.264-65. Shirley Hazzard criticizes that "the U.N. administration has shown itself, for all its greater funds and advantages, less prompt and enterprising than the Red Cross or the smallest voluntary agencies." Hazzard, "System Failure: The Trouble with the U.N." *New Republic* (21 Sept. 1992), p.16.

> Legally the membership of the UN has done an admirable job on human rights. The necessary texts exist. But practically where does an individual or a group of individuals find recourse against oppression within his own country? World public opinion has become an increasingly important factor in such problems.[141]

With some notable exceptions,[142] governments are sensitive to public criticism of their human rights record.[143] Using publicity and building public opinion is an effective way for NGOs to impact on State dignity in order to restrain human rights abuses.[144]

---

[140] Humphrey, *supra*, n.14, p.19.

[141] U.N. General Assembly, Official Records, Twenty-sixth Session, Supplement 1A (A/8401/Add.1), para.146-47.

[142] Recent examples include China in Tiananmen Square, Romania's Ceaucescu dictatorship during the period prior to his fall and the apartheid regime in South Africa until de Klerk.

[143] For example, during the "dirty war" in Argentina, Argentine generals hired the Madison Avenue public relation firm of Murston Marsteller to clean up its image. Iain Guest, *Behind the Disappearance: Argentina's Dirty War against Human Rights and the United Nations* (Philadelphia: University of Pennsylvania Press, 1990), pp.69-70. When the International Commission of Jurists issued a report highly critical of Chile, that government responded by a series of half-page advertisements in the New York Times and the Washington Post. See McCartny, "The Chilean Junta's Advertising Campaign" *The Washington Post* (10 Dec. 1974) A20.

[144] See Archer, "Action by Unofficial Organizations on Human Rights" in E.Luard ed., *International Protection of Human Rights* (London: Thames and Hudson, 1968), p.178; Shestack, "Sisyphus Endures: The International Human Rights NGOs"(1978), 24 New York School of Law Review, pp.108-9. By observing the character of the State on the international plane, Shestack stresses the importance of public opinion in human rights matters:

> Even repressive rulers like to present faces of concern for humanitarian goals. Perhaps this is not shame or embarrassment; perhaps it is to win favour with allies, trading partners or the investment community; or, perhaps simply because public relations secretly rules the world. Whatever the psychological, political or sociological causes,

These methods are of particular importance for improving the situation of political dissidents. Based on his experience and activities, Andrei Sakhalov stated before the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) in 1977:

> the issue of communication... is crucial for the human rights struggle.... The only weapon in our struggle is publicity. During this era of detente and a broadening struggle for human rights, communication with the West, receipt in the West of information about human rights violations and the effective, conscientious utilization of such information have become crucial.[145]

Dissidents contend that the pressure of public opinion has led either to the release or to the better treatment of political prisoners. According to Anatoli Shcharansky, during the 1970s the Soviet government tolerated a certain level of dissidence because:

> to take more direct measure against us would be to return the days of Stalin.... They are interested in Western public opinion, and most of the present leaders are the very men who survive Stalin. World opinion is what keeps us going, what keeps us alive.[146]

Publicity not only serves to mobilize public opinion but also to promote unity among dissidents and moreover activate the internal populace which has a potential for

---

> focusing world attention on human rights is a valuable tool to effect limited redress, often bringing concessions designed to placate both external condemnation and domestic opposition.

Ibid.

[145]. Andrei Sakhalov, "Soviet Workers, the AFL-CIO and Human Rights", speech reprinted in 28 A Chronicle of Human Rights (1977), quoted by Richard N.Dean, "Nongovernmental Organizations: The Foundation of Western Support for the Human Rights Movement in the Soviet Union" in R.P.Claude and B.H.Weston ed., *Human Rights in the World Community: Issues and Action* (Philadelphia: University of Pennsylvania Press, 1989), p.305.

[146]. *Time* (21 Feb. 1977), p.22, qoated by Dean, *ibid.*, p.306.

action or, in the words of Shestack, "sleeping power."[147] Citing a case from the Dominican Republic in 1971, Weissbrodt observes the frequent interaction between international human rights pressure and internal political sentiment as a major reason for the release of improperly detained persons.[148]

Activity by Amnesty International, normally assigned to the release of prisoners of conscience, has resulted in a number of successes via mobilizing its local groups.[149] As part of A.I.'s frequent involvement in a world-wide campaign,[150] the tireless efforts of local Amnesty groups can not be underestimated. Their person-to-person approach, such as writing letters to prison officials, judges and government officials, visiting embassies, and sending appeals to lawyers, tends to give Amnesty International a rather "amateurish image", though, such an energetic approach "can be effective when the more professional, sophisticated, better researched, and discreet efforts of the International Secretariat or other international non-governmental organizations are not successful."[151] The local groups, being in a position to put direct pressure on governments, can play a vital role in deterring human rights abuses.

---

[147]. Shestack, *supra*, n.144, p.109.

[148]. In response to the unfair extension by the Dominican government of the term of sentence of a political prisoner, Julio Augusto de Pena Valdez, all 250 political prisoners at the prison went on a hunger strike. Their actions received considerable support among those who were opposing the election of the President. Amnesty International joined this movement and campaigned to release the prisoner by sending telegrams and letters, which gave international credence to the already-existing pressure for the release of the prisoner. The author mentions that "the relatively free press of the Dominican Republic made the Dominican people aware of international public opinion expressed by Amnesty International," which eventually strengthened the domestic pressure against the government. After the Presidential election, the prisoner was released. Weissbrodt, *supra*, n.5, p.428, n.122.

[149]. There are over 6,000 local Amnesty International groups in over 70 countries around the world. In 44 countries these groups are coordinated by sections. In addition, there are individual members, supporters and recipients of Amnesty International information in more than 150 countries and territories. A.I., *Annual Report* (New YorK: Amnesty International Publication, 1991), p.270. See generally Scoble and Wiseberg, "Amnesty International: Evaluating the Effectiveness of a Human Rights Actor"(Sep.- Oct. 1967), Intellect, at 79.

[150]. E.g., after A.I. joined a world-wide campaign for the release of a Bulgarian economist from a death sentence, he was allowed to leave his country in August in 1974. "Spetter Thanks Amnesty"(Winter, 1975), 1 A.I. Matchbox, at 26.

2. Fact-finding Missions

NGO publicity campaigns, which require objective and impartial information, owe a great deal to on-site investigations. In order to collect and disseminate information, NGOs have often sent fact-finding missions to the country concerned.[152] Sending the mission is intended to put pressure on the government concerned by submitting recommendations to the government and by publicizing the reports of findings. For example, in 1976 the International League for Human Rights sent a mission to Paraguay to investigate detention and torture of the senior staff of the Project of Marandu, a plan designed to help the abused population of Paraguay Indians.[153] After interviewing prisoners and their families, the mission issued a report which recommended investigation by the Organization of American States and the U.N. regarding the continuing human rights abuses as well as calling for termination of U.S. military aid.[154] The report drew wide press attention and moved Paraguay to act for the prisoners, including trials of the prisoners who had been denied any legal status. Subsequently, they were released, and the Marandu Project was permitted to resume its work for Indians.[155] There may be no direct effect between the mission's visit and the result of prisoner release, though at least it can be said that the mission's recommendations had a considerable impact which induced the subsequent pressures by governments and inter-governmental organs.

---

[151]. Weissbrodt, *supra*, n.5, p.427.

[152]. *Ibid*., pp.412-14.

[153]. Immediately before the mission's visit, Paraguay released Miguel Chase-Sardi, an eminent anthropologist and the director of the Project, after imprisoning him for seven months. The I.L.H.R. sources attributed his release to the organization's efforts. See I.L.H.R., *Annual Review* (1976-77), pp.2-3.

In the event that the country concerned lacks expertise and concepts necessary to reform its legal institutions, the recommendations by such missions are occasionally acknowledged in that country. At the time the plight of mentally ill in Japan was on the agenda at the U.N. Commission on Human Rights, the majority of domestic public opinion moved support to institutional reform relating to the mentally ill. However, due to a lack of pressure on the government and a lack of clear vision and expertise for the legal reform, discussion on this issue had been procrastinated.[156] The recommendations submitted by the NGOs' experts mission in 1985,[157] including a clear direction for institutional reform, gave impetus to the officials concerned. In accordance with the recommendations, the Japanese Mental

---

[154] I.L.H.R., *Report of Commission of Enquiry into Human Rights in Paraguay* (Sept. 1976), p.32.

[155] I.L.H.R., Human Rights Bulletin (Nov. 1977), pp.2-3.

[156] According to a discussion paper by Etsuro Totsuka, those who were concerned with this issue commonly felt the necessity of an external impetus by international authorities in this field, who might suggest concrete plans for the institutional reform. Totsuka, "Human Rights Activities in the International Society" in Shigeki Miyazaki ed., *Global Problems of Human Rights* (Tokyo: Sanseido, 1988), p.137.

[157] See *supra*, n.83.

Hygiene Act was amended in 1987.[158]

Since governments have no obligation to cooperate with on-site investigations, NGO inquiries do not always succeed. Nevertheless, sending the mission has often put substantial pressure on the government concerned. For instance, in 1974 a group of NGOs[159] dispatched a mission to Greece to seek the release of seven lawyers who had been imprisoned because they had defended students arrested for protesting. The Greek junta refused to meet with the mission. However, its action received world-wide attention and led to criticism of Greece, and as a result the imprisoned lawyers were released.[160]

3. Diplomatic Initiatives

With a view to achieving human rights improvements, NGOs generally rely on public opinion by publicizing the results of their fact-finding missions, though an exception is found in the practice of the International Committee of the Red Cross (I.C.R.C.). The I.C.R.C. has the most extensive program of visiting places of detention with the permission of the government concerned.[161] Emphasizing diplomatic initiatives to governments, the I.C.R.C. generally provides detailed findings of its missions only to the host government. Should governments misrepresent the findings, the I.C.R.C. reserves the right to release its results.[162]

---

[158] For discussion of the amendment of the act, see "Medical Treatment of the Mentally Ill and Human Rights Violations in Japan"(1987), 20 Law in Japan, pp.36-46.

[159] Those NGOs were the International League for Human Rights, the International Commission of Jurists, the International Law Section of the American Bar Association and the Association of the Bar of the City of New York.

[160] See Abrams, Bulter and Humphrey, *Report of an International Commission of Inquiry into the Detention of Lawyers in Greece* (May, 1974) (unpublished paper), quoted by Shestack, *supra*, n.144, p.114.

[161] According to a remark by the representative of the I.C.R.C., by 1982, the I.C.R.C. has visited more than 300,000 detainees consequential to internal unrest in eighty countries after World War II. A.Hay, "The ICRC and International Humanitarian Issue"(1982), 283 The International Review of Red

The I.C.R.C.'s "quiet diplomacy" is based upon a pragmatic compromise with governments in order to gain the most access possible to detainees. In doing so, the I.C.R.C. has consistently avoided issuing statements containing legal characterization of conflicts or disputes. Instead, it has stressed its presence as a neutral humanitarian body. David Forsythe properly discusses its "victim-oriented" approach:

> The ICRC... has never tried to base its approach explicitly on the international law for human rights in peace time,... If the ICRC believes that such victims of politics might benefit from a neutral humanitarian intermediary, it presents itself to the [controlling] authorities despite the absence of clear legal foundation.[163]

He also states that "the price of getting into detention centres is that of not questioning the reason of detention."[164]

The effects of "quiet diplomacy" depend on the reputation of the NGO in question. The I.C.R.C. has successfully relied for its results on its international prestige stemming from its humanitarian and non-political activities. Amnesty International occasionally relies on this type of intervention, though in a personal

---

Cross, p.7.

[162]. The I.C.R.C. released its results in two cases concerning Greece in 1969 and Iran in 1980, since the governments concerned had partially published its report. See Weissbrodt and McCartny, *supra*, n.51, pp.86-87.

[163]. Forsythe, *The Internationalization of Human Rights* (Massachusetts: Lexington Books, 1991), pp.150-51.

[164]. Forsythe, *Present Role of the Red Cross in Protection: Background Paper No.1* (Geneva: ICRC, 1975), p.35.

manner, with the threat of public exposure of the situation. For instance, Vladimir Bukovosky, who was confined in a psychiatric hospital in the Soviet Union, attributes his release in 1985 to a personal visit to the hospital director by a member of A.I. who threatened to bring the matter before an international tribunal.[165] The personal petition from the assistant director of the British Section of Amnesty International to the U.S.S.R. Minister of Internal Affairs is reputed to have prompted the transfer of Sergei Kovalov to a Leningrad prison so that he could receive proper medical care.[166] In taking diplomatic initiatives, "name value," based on integrity and credibility, of the NGO is an essential factor in adding credence and dignity to such actions so that it may help the NGO to have meaningful and persuasive dialogue with governments.

---

[165] "Vladimir Bukovsky: Remarks to the American Psychiatric Association"(1977), 26 A Chronicle Human Rights, pp.55-56.

[166] "Kovalev Receives Treatment"(1977), Samizdad Bulletin, p.50.

CHAPTER IV

CONCLUSION

A. Global Human Rights Movements and NGOs: Background

The involvement of NGOs in international human rights is, with a few notable exceptions (e.g., the Anti-Slavery Society and the International Committee of the Red Cross), generally understood as a recent phenomenon.[1] In the last half century, in the words of Robert Friedlander, "truly meaningful human rights activities in the international scene have been undertaken by NGOs."[2] They have demonstrated the capability to respond to and fulfil a public need. NGOs have proliferated[3] and diversified their activities[4] and, in the process, they have grown more powerful. Christopher Hill observes that NGOs "see politics on the surface of the earth as an integrated process operating in a single community."[5] Commentators predict that the contemporary global human rights movements will continue to gain in strength with substantial aid from nongovernmental actors.[6]

---

[1] Theo van Boven, "The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: Prerequisite of Democracy"(1990), 20 California Western International Law Journal, p.209. Virginia Leary, "A New Role for Non-Governmental Organizations in Human Rights: A Case Study of Non-Governmental Participation in the Development of International Norms on Torture" in A.Cassese ed., *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn - The Netherlands: Sijthoff and Noordhoff, 1979), p.198.

[2] R.A.Friedlander, "Human Rights Theory and NGO Practice: Where Do We Go From Here?" in Ved.P.Nanda et al, *Global Human Rights* (Boulder, Colorado: Westeview Press, 1981), p.222.

[3] There are no exact figures on the number of NGOs, though on the basis of the regional statistics in the *Human Rights Directory* (Washington: Human Rights Internet), Lowell W.Livezey estimates at least 2,000 visible organizations working for international human rights in non-Communist countries. Livezey, *Nongovernmental Organizations and the Ideas of Human rights* (New Jersey: The Center of International Studies Princeton University, 1988), p.20.

[4] See Laurie Wiseberg, "Protecting Human Rights Activists and NGOs: What More Can Be Done?"(1991), 13 Human Rights Quarterly, p.528.

Questions arise. Why have NGOs been increasingly recognized as significant human rights actors? What has spurred NGOs to take part in global human rights movements? In considering these questions, my observations will focus on two phenomena: (1) the frustration of U.N. human rights machineries; and, in the words of Roling, (2) the "vertical expansion"[7] of the international community.

1. The Frustration of U.N. Human Rights Machineries

In the evaluation of U.N. efforts for the implementation of human rights, there is no lack of criticism. Richard Ullman writes that "The UN human rights machinery has become so politicized as to be almost completely ineffective for either monitoring or for enforcement."[8] Louis Henkin views the ideological conflict which predominantly influenced the human rights organs as follows:

> ..., perhaps the greatest influence, unfortunately, has been that of the Cold War.... Human rights proved not a common interest but a political football..., the Cold War inevitably turned United Nations

---

[5]. Hill, "Implication of the World Society Perspectives for National Foreign Policies" in Michael Bank ed., *Conflict in World Society* (New York: St.Martin's Press, 1984), pp.174-91.

[6]. R.P.Claude and B.H.Weston, *Human Rights in the World Community: Issues and Action* (Philadelphia: University of Pennsylvania Press, 1989), p.298.

[7]. B.V.A.Roling, *International Law in an Expanded World* (Amsterdam: Djambatan N.V., 1960), p.XXI.

[8]. Ullman, "Human Rights: Toward International Action" in Jorge I.Dominguez, et al ed., *Enhancing Global Human Rights* (New York: McGraw-Hill, 1979), p.10.

> activity from cooperation in promoting human rights to exploitation of human rights issues for Cold War purposes.[9]

He also notes the North/South issue in which anticolonialism pervaded the U.N. Human Rights Commission:

> Human rights was being used as a political weapon against colonialism or economic imperialism, not to enhance the rights of all persons against all governments.[10]

Based on the common assumption that the U.N. is a political organ wherein the political factor tends to prevail, Theo van Boven critically observes that "the U.N. will never be in a position to discharge its responsibilities in a satisfactory manner."[11]

Such criticism may not seem remarkable in view of the characteristics of the U.N. and international human rights instruments which, as stressed by John G.Ruggie, "are designed not to enforce human rights provisions, but to nudge states into permitting their vindication."[12] Similarly, Henkin argues that "disappointment may reflect unwarranted expectations."[13] As observed in Chapter III, the immediate impact is generally slight, because the U.N. machineries are designed to provide conciliation rather than a judicial settlement.

---

[9] Henkin, "The United Nations and Human Rights"(1965), 19 International Organization, p.511. One of the examples exemplifying such ideological purposes is to be found in the "Russian wives" case in 1949. In this case the U.N. General Assembly condemned the Soviet Union, as a breach of human rights, for its refusal to allow Russian women to leave the Soviet Union to join their alien husbands abroad, while keeping silent about the discriminating policies regarding mixed marriages in Australia, the United State and South Africa. See L.C.Green, "Human Rights and the Colour Problem"(1959), 3 Current Legal Problems, pp.245-49.

[10] Henkin, *supra*, n.9, p.513.

[11] van Boven, "United Nations and Human Rights: A Critical Appraisal" in A.Cassese ed., *supra*, n.1, p.128. See also Ernst Haas, "Human Rights: To Act or Not to Act?" in Kennth A.Oye et al ed., *Eagle Entangled: U.S. Foreign Policy in a Complex World* (New York: Longman, 1979), at 188; S.Anderson, "Human Rights and the Structure of International Law"(1991), 12 New York Law School Journal of International and Comparative Law, at 1.

[12] Ruggie, "Human Rights and the Future International Community"(1983), 112 Daedalus, p.106.

Although proposals were made at the U.N. on several occasions by State representatives and Judge Elias of the World Court who called for the establishment of an International Court of Human Rights,[14] those proposals have never been discussed in detail. The creation of such a court contains a host of intractable problems.[15] Detailed suggestions relating to these problems have been made by some writers,[16] which are beyond the scope of this paper, but given the unwillingness of States to subject their own legal systems to universal jurisdiction, the creation of such a court remains unrealistic.

Despite the ideal of promoting universal human rights as enunciated in the

---

[13]. Henkin, *supra*, n.9, p.507. He observes that "[f]or the most part, human rights can only be promoted indirectly" by the U.N. *Ibid*., p.514.

[14]. Such an idea is traceable to the suggestions by Australia in the 1946 Paris Peace Conference and at the Human Rights Commission in 1947; a proposal by the Colombian representative to the U.N. General Assembly in 1961; a discussion paper by Judge Elias of the International Court of Justice in 1968; a speech by President Kaunda of Tanzania at the General Assembly in 1970. See P.R.Gandhi, "The Human Rights Committee and the Right of Individual Communication"(1986), 57 The British Year Book of International Law, p.251.

[15]. See e.g., Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons Ltd., 1950; reprinted by Connecticut: Archon Books, 1968), pp.382-387; L.C.Green, "Institutional Protection of Human Rights"(1986), 16 Israel Yearbook on Human Rights, p.102.

[16].See e.g., Sean McBride, "The Strengthening of International Machinery for the Protection of Human Rights" in Eide and Schou ed., *International Protection of Human Rights* (Stockholm: Interscience Publisher, 1967), at 149; Kamleshwar Das, "Some Reflections on Implementing Human Rights" in B.G.Ramcharan ed., *Human Rights: Thirty Years after the Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1979), at 131.

U.N. Charter, the frustrated practice by the U.N. has spurred NGOs to action.[17] Numerous NGO initiatives intend, in Cassese's words, to "make up for the shortcomings of the World Organizations with their own direct action."[18] As James A.Joyce writes, while the U.N. falls short in the defence of human rights, "it is the non-governmental groups who are steadily forming a global if not yet systematized movement of investigation, protest and reform."[19] The idea that deficiencies of intergovernmental organizations stimulate NGO activity is supported by the contrasting state of affairs in the more advanced European human rights regime (including a human rights court), where NGOs play a less active role than in the universal mechanism.[20] Thus, it is apparent that the growing significance of NGOs reflects the persistent weakness of global institutions.

2. Vertical Expansion of the International Community

In comparison to the "horizontal expansion" of the international community (due to the independence of colonial nations) which falls in the domain of the traditional principle of inter-State relations, "vertical expansion" aids the proliferation of non-state entities, e.g., intergovernmental organizations, non-governmental actors and multinational corporations. The spread of non-state entities reflects the trend of divergent subject-matters of international law (e.g., human rights, trade organizations, labour conventions, environment, transport control or health regulation) with which the traditional inter-States regulations are no longer adequate to cope.[21]

---

[17] The 1993 Vienna Conference on Human Rights is one recent example inspired by NGO initiatives. See "Focus of Rights Conference: Theory, Not Specifics" *The [New York] Times* (14 June 14 1993) A3; *Supra*, Chapter II, p.91, n.155.

[18] A Cassese, "Progressive Transnational Promotion of Human Rights" in B.G.Ramcharan ed., *supra*, n.16, p.251.

[19] Joyce, *The New Politics of Human Rights* (New York: St.Martin's Press, 1978), p.79.

[20] See David Weissbrodt, "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights" in T.Meron ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), p.425. See also P.Rohn, *Relations Between the Council of Europe and International Non-governmental Organizations* (Brussels: Union of International Associations, 1957).

These new entities, having different interests from those of States, have sought their own place in the international community. Accordingly, the traditional structure of international society, composed of sovereign States, has been penetrated by a variety of international actors, such that NGOs have begun to play an important role in enriching international life.

In this expanding international community, the peoples of the world increasingly are demanding to participate in shaping the world in which they live. Modern international law accordingly "must of necessity accept super-national communities in which [even] individuals sometimes participate directly."[22] NGOs as "international agents" of the peoples are required to play a vital role such that "the individual can most effectively contribute to the building of a better world."[23] The growth of NGOs reflect the people's demands. Their global human rights movements are part of this broader process in the international community.

---

[21]. W.Friedmann, *Law in a Changing Society* (London: Stevens and Sons Limited, 1959), p.419.

[22]. B.V.A.Roling, *supra*, n.7.

[23]. L.C.White, *International Non-Governmental Organizations: Their Purpose, Methods, and Accomplishments* (New York: Greenwood Press Publishers, 1968), pp.11-12, p.278.

B. Remaining Problems in NGO Activities

The majority of NGOs which play leading roles on the international stage today have a "Western-orientation." Although Organizations in Eastern Europe and Third World countries have emerged in recent years, they are still few and those in Third World States are more likely to be seen as dissident or liberation groups. As many writers point out, Western-oriented NGOs tend to stress traditional Western liberal values, focusing primarily on civil and political rights, while deemphasizing the salience of economic, social and cultural rights. As a result,

> their investigative work naturally concentrates on matters such as governmental abuses of rights to personal security, discrimination, and basic political rights. By habit or established practice, NGOs' reports stress the nature and number of violations, rather than explore the socio-economic and other factors that underlie them.[24]

This is partly due to the fact that many NGOs were created in the 1960's and 1970's in response to mass violations of civil-political rights in a number of countries, with the intention of addressing those fundamental problems.[25] With few exceptions,[26] the rights in question are individual rights, most notably the security of the person.

---

[24]. Henry J.Steiner, *Diverse Partner: Non-Governmental Organizations in the Human Rights Movements* (Massachusetts: Harvard Law School Human Rights Program and Human Rights Internet, 1991), p.19.

[25]. *Ibid.*

[26]. The movement by NGOs toward setting up the U.N. Declaration of Indigenous Peoples is the most current phenomenon, though it remains at the level of standard-setting. See *Supra*, Chapter II, pp.88-90.

1. The Expansion of NGOs' Mandate

It has been argued that NGOs should expand their mandates and rethink their methods in order to deal more comprehensively with human rights issues.[27] Critics assert that NGOs should take into account economic and social rights as parts of an integrated view of needs and rights in Third World societies. While conceding the necessity of civil and political rights, they argue that such a perspective alone is insufficient for progress toward the ideals expressed in the full range of postwar human rights instruments. In the context of the U.N. human rights activities, which have been broadening the concept of human rights, Chiang approves the widening scope of NGO activities, noting that this will eventually help better NGO-U.N. relations.[28] He writes that:

> [s]uch broadening might well be used, for example, to justify current tendencies urging the substitution of "economic and social" for the original emphasis on "political and civil" rights of the individual, while categorizing NGOs into "talking" and "action, program," NGOs might encourage and even exemplify the already existing either-or approach to the task of defining human rights.[29]

There are some examples of NGOs advocating socio-economic rights. The work of the International Commission of Jurists (I.C.J.) tries "to promote economic, social and cultural conditions under which [its] legitimate aspirations may be realized."[30] The I.C.J. has worked for "hardening" the International Covenant on Economic, Social and Cultural Rights which is often described as "soft law." The 1986 Limburg Principles, which focus upon the implementation of the International Covenant on Economic, Social and Cultural Rights, is one of its achievements.[31] Citing the recent trend of NGO advocacy of socio-economic rights opening ways to gaining the cooperation of churches and trade unions, Steiner notes that these organizations adversely affect possibilities of efficient mass action.[32] With regard to fulfilling economic needs, some NGOs (i.e., the Red Cross and religious groups), on occasion provide material goods as acts of mercy, or as a matter of duty. These agencies perceive such humanitarian assistance as part of the international human rights movement.[33] This has been particularly the case in drought-affected Africa and in places suffering from natural disaster.

---

[27]. The 1993 Vienna Conference on Human Rights, with the presence of some 1,000 NGOs, showed a new trend in which some NGOs advocated broader interests of peoples including economic and cultural rights. As a result of the Conference there was a strong support for finding some means whereby NGOs in the human rights field might evolve some coordinating machinery, called the continuation committee, for their activities. See "Human Rights Groups Finds They Lack Cohesion" *The [Toronto] Globe and Mail* (29 June 1993) A5. See also *supra*, Chapter II, p.91, n.155.

[28]. Pei-heng Chiang *Non-Governmental Organizations at the United Nations: Identity, Role, and Function* (New York: Praeger Publisher, 1981), p.267.

[29]. *Ibid.*

Opponents of the above contentions, mainly Western-oriented NGOs, seek to ground their stance in pragmatic reasoning. Scoble and Wiseberg suggest that the expansion of NGOs' mandate to socio-economic rights clearly requires "major ideological shifts" on the part of Western-oriented NGOs, which in turn "threatens the NGOs with the probable loss of support of some elements within their established constituencies inside capitalist societies."[34] The National Association for the Advancement of Coloured People Legal Defence and Educational Fund (N.A.A.C.P.L.D.F.) made attempts to link its traditional work on racial discrimination to welfare issues including assistance to poverty, but gave up for fear of impairing the organization's effectiveness and of leading to loss of members.[35] By the same reasoning, the American Civil Liberties Union has also avoided the expansion of its mandate.[36] "Ideological coherence" is indeed a positive feature, not only to obtain ideological, financial and moral support in Western countries, but also to avoid conflicts of interests in their decision-making.[37]

---

[30] ICJ, *Memorandum* (Geneva: ICJ, May 1970).

[31] See ICJ, *Report on Activities, 1986-1988* (ICJ, 1988), pp.12-4. For details of the Principles, see "The Limburg Principles on the Implementation of Economic, Social and Cultural Rights"(1987), 9 Human Rights Quarterly, pp.122-35.

[32] Steiner, *supra*, n.24. p,44.

[33] Livezey, *supra*, n.3, pp.132-33.

The efforts made by NGOs for socio-economic rights is a new and remarkable trend, however most of them remain at the level of "promotion of respect" for these rights. With regard to humanitarian assistance or advocacy of the right to food, such assistance, being conducted *ad hoc* and in extremely limited situations, is intended to defend the right to life rather than to promote economic well-being.

Given the risk of impairing the organizations' functioning, prudence is certainly required in extending NGOs' mandate. Steiner's view is indicative in this respect:

---

[34] H.M.Scoble and L.S.Wiseberg, "Human Rights NGOs: Note Towards Comparative Analysis"(1976), 9 Human Rights Journal, p.639.

[35] Steiner, *supra*, n.24, p.11.

[36] *Ibid.*, p.20.

[37] Yogesh K.Tyagi, "Cooperation between the Human Rights Committee and Nongovernmental Organizations: Permissibility and Propositions"(1983), 18 Texas International Law Journal, p.275.

> the very success of INGOs could inhibit a movement toward broader mandates. Amnesty International, for example, performs it superbly. Its skill and prominence may suggest to others that its carefully limited mandate is the appropriate one for an INGO, and may thereby inadvertently discourage the development of INGOs with different goals and methods.[38]

2. The Selection of Cases

The limited resources of the organizations require distribution of their scarce services, which accordingly become a determinant in selecting cases and targets (most likely governments). This decision-making discloses the principles and, on occasion, ideologies of the organizations. As observed by Weissbrodt,

> [t]here is sometimes a risk that an NGO will choose to investigate and pursue a particular violation only because the state concerned is an easy target. NGOs may avoid pursuing violations because that might upset influential friends, sources of financial support, friendly governments. The possibilities for abuse in the selection of test cases are legion.[39]

To avoid giving the impression of taking sides in politics, NGOs like Amnesty International try very hard to maintain a balanced selection of countries based on its specific mandate: the release of political prisoners and now the campaign against capital punishment.[40] However, not all NGOs are so concerned. Some may actually select cases based on an ultimate political purpose.[41]

---

[38] Steiner, *supra*, n.24, p.63.

[39] Weissbrodt, *supra*, n.20, p.409.

[40] The discreet approach by A.I. to depoliticize human rights issues is observed in the statement by the former Secretary-General of A.I., Martin Ennals, who says, "[t]he easiest way for some governments to avoid any real dialogue is to claim (as loudly as possible) that our concern for human rights is politically biased." In an interview in the staff magazine, *UN Special* (Geneva, April 1977), quoted by Joyce, *supra*, n.19, p.81.

Besides political inspiration, critics point to a differential approach of favouring "elite" victims in the selection of cases. Scoble and Wiseberg see it as a general tendency for Western NGOs, saying:

> the NGOs have been most successful where they have limited the human rights issue to the question of protecting the civil and political rights of well-known personages - members of the "intelligentsia" or those who might better be termed "individual former members of a national elite whose intellectual creation and/or pronouncements have caused them to fall into publicized disfavour of that elite" - while they have been less successful in protecting ordinary members of the mass. Yet the underlying and implicit objective of a human rights movement is the equality of man in his essentially human attributes.[42]

They cite two cases of such practice. One is the case of Ethiopia in which some NGOs "expressed such intense concern over the execution" of some 60 Ethiopian elites by the Ethiopian provisional military administration in 1974, while the organizations had been silent about "the executions as a result of the grinding poverty of the Ethiopian feudal serf."[43]

In the other case relating to India, they note that NGOs in general have been "highly vocal about the abrogation of civil and political rights of India's opposition parties," while remaining "...relatively silent about massive death tolls, through starvation and disease."[44] In conclusion, Scoble and Wiseberg attribute "differential success" by NGOs to a "formalistically legal and elitist approach" to the victims of repression by governments.[45]

---

[41]. There have been criticisms of particular activities of the I.C.J. on this ground regarding, for example, Israel. See e.g., the I.C.J., *ICJ Report on Activities 1981-85* (Geneva: ICJ, 1985), pp.46-52. See also *infra*, p.159, n.51.

[42]. Scoble and Wiseberg, *supra*, n.34, pp.638-9.

[43]. *Ibid*., p.639.

[44]. *Ibid*.

3. Inattention to Structural Factors

The approach of Western NGOs, being of an individualistic orientation, tends to concentrate on individual cases involving government violations of identifiable persons' rights. The mandates of Amnesty International and the International Committee of the Red Cross are examples of such an approach. Scoble and Wiseberg stress that such a "crisis-oriented" approach undermines the social and structural elements underlying the systematic violations of human rights:

> [NGOs] find themselves in the unenviable position of mopping up the worst consequences of violations without moving toward an understanding of structural causes and, thus, to institutional transformations which might significantly reduce these excesses.... [W]ithout attention to causal factors, the danger is that the "progress" registered will be superficial and temporary.[46]

Such criticism arises particularly in cases occurring in Third World countries which are under repressive regimes. Those arguing for broader social analysis in these countries find a number of elements which cause structural violence: landholding patterns; class and caste relationships; civilian-military relationships; patterns of discrimination involving race, ethnicity, and gender; the institutionalization of particular religious beliefs and practices; formation of political elites and political parties; and control of trade or industry guiding an export-led model of economic development.[47] They also attribute such violations of rights to First World policies, viz., ill-conceived foreign aid or development projects accompanied by exploitation by multinational corporations, commercial banks and international financial institutions.[48]

---

[45]. *Ibid.*

[46]. Scoble and Wiseberg, "Recent Trends in the Expanding Universe of NGOs Dedicated to the Protection of Human Rights" in V.P.Nanda ed., *supra*, n.2, p.258.

The above contention is based on the assumption that systematic violations of human rights could be at best ameliorated temporarily, unless underlying socio-economic and political structures were changed. This assumption leads to more active, "reform-oriented" initiatives by NGOs which are designed to support different political institutions. A member of a Latin American NGO stated at a meeting of NGOs that:

> When you look at the wider situation, protests about individual cases don't lead to an independent judiciary. How do we create effective democratic reform? The international community is not as strong on these issues. This requires some form of mass mobilization, some economic leverage.[49]

In this vein of thinking, Scoble and Wiseberg argue that the "apolitical" approach by NGOs is naive and dangerous as well as self-defeating:

---

[47]. Steiner, *supra*, n.24, p.25, 28, 30 and 32.

[48]. *Ibid.*, p.44. According to an interview by a Financial Times reporter with the present Secretary-General of Amnesty International, Pierre Sane, A.I. scrutiny is extending to terrorist groups, multinational companies and financial institutions like the World Bank and International Monetary Fund (I.M.F.). Mr. Sane, the Senegal born representative, says:

> We have to change the image of Amnesty International as being a western organization. Even if it is western, it is the bearer of universal values - and being western does not necessarily means it is bad.

"A Voice for the Victims" *The [London] Financial Times* (19/20 June 1993) XXII.

[49]. Steiner, *supra*, n.24, p.31.

> there is a need to recognize that human rights issues are inherently political (because power-oriented) conflicts and thus there is a need to politicize them in precisely these terms.[50]

There are some examples of NGO activities aimed at mass mobilization of citizens,[51] though such initiatives always contain the risk of depriving NGOs of their credibility and integrity. In particular if supporting a liberation movement, moreover if supporting a revolutionary change, the NGO may be seen as a terrorist group.[52] Drastic change of the social structure is more likely to lead to an adverse reaction by the ruling group, accompanied by increased suffering of masses in a given country.

4. NGO Initiatives and State Foreign Policy

At a meeting of human rights activists in Crete in 1989, Luis Perez Aguirre, the member of the Third World human rights NGO SERPAJ-Uruguay, made a sceptical comment on the effect and value of NGO activities, citing the case of Uruguay:

> it was intervention of the Canadian government that was particularly helpful during the period of stark repression, partly because the Uruguay government was then negotiating a trade agreement with it. A.I. and other INGOs may have been useful in influencing international public opinion, but they had little influence on what was happening internally.[53]

---

[50] Scoble and Wiseberg, *supra*, n.34, p.636.

[51] During the Indian Emergency in 1989, many NGOs quietly urged citizens to vote against Gandhi and helped to draft the new government's five year plan. In the Philippines, many NGOs urged voting for Aquino. Steiner, *supra*, n.24, p.71.

[52] See e.g., Argentine charge against the oral statement at the U.N. meetings by the member of the International Commission of Jurists and Pax Romana, in Chapter III, pp.123-4.

[53] Steiner, *supra*, n.24, p.68.

While conceding the efforts by the I.C.R.C. on the treatment of prisoners and by NGOs in bringing the situation to the attention of the U.N. machinery, he doubted that NGO activities had any international influence within a given country.[54]

A similar instance is found in the situation of Argentina. Argentina had persistently rejected any intervention by external bodies, viz., the U.N., the O.A.S. and NGOs until September 1978 when it finally accepted the visit of the Inter-American Commission on Human Rights. The acceptance coincided with a significant decrease in the frequency of disappearances. This change of Argentina's stance is reputed to be the result of U.S. intervention.[55]

In saving dissidents or stopping torture under repressive regimes, State diplomacy (e.g., economic and military aid cut-off) has been seen on occasion to be more effective in influencing the authorities of the country than public reproaches in the U.N. forum or international media. In such a situation, NGOs should play a complementary role by using publicity, with the intention of bringing about official action by a government which is in a position to negotiate with the violating government.[56] The combination of NGO publicity, often including recommendations regarding a State's foreign policy, and governmental diplomacy may be constructive in this context.[57]

---

[54]. *Ibid.*

[55]. In September 1978, certain actions between the U.S. and Argentina, including the U.S. acceptance of loans to Argentina in the Inter-American Development Bank, reconsideration of U.S. military aid, and a diplomatic deal between the U.S. Vice President Mondale and the Argentine President Videla in Rome, were made allegedly in exchange for the agreement of the Argentine government to accept the Inter-American Commission visit. M.Bartolomei and D.Weissbrodt, "The Impact of Factfinding and International Pressure on Human Rights Situation in Argentina, 1976-83" in Newman and Weissbrodt ed., *International Human Rights: Law, Policy, and Progress* (Cincinnati: Anderson Publishing Co., 1990), pp. 246-252. See also Lillich, *International Human Rights: Problems of Law, Policy and Practice* (Boston: Little, Brown and Company, 2nd ed, 1991), pp.977, pp.1002-1012.

Some NGOs work through their governments on the assumption that human rights are best defended via bilateral State relations rather than via universal or regional intergovernmental organs. For example, Human Rights Watch (a U.S.-based NGO) often gives priority in its human rights violation strategy to influencing U.S. foreign policy towards offending countries. Such NGOs urge their governments to apply diplomatic pressure, to express public disapproval, or as a last resort to impose trade or aid restrictions.

Although their motivation is often in doubt and the effect of their lobbies uncertain, the fact is, as Forsythe writes, that the "human rights lobby" in Washington is becoming a significant force.[58] Other NGOs, such as Amnesty International and the International League for Human Rights, regard themselves as more expert advisers than lobbyists, providing information to governments in the belief that "knowledge is power."[59]

---

[56]. Citing the case of the British government, Evan Luard discusses the interaction between domestic public opinion on human rights issue and a State's foreign policy:

> How far a government will in practice go in criticising a friendly or politically important state about its human rights policies depends usually on the degree to which public opinion at home demands it, rather than on the absolute scale of its atrocities.

Luard, *Human Rights and Foreign Policy* (Oxford: Pergamon Press, 1981), p.11. The author enumerated countries (the Soviet Union, Uganda, Chile and South Africa) of which the British government has not hesitated to express its condemnation, "because public opinion at home demands it." *Ibid.*

[57]. The promotion of human rights as an aim of foreign policy is not a recent arrival. For example, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith, established in the nineteenth century, sought a U.S. government role in opposing the anti-Jewish pogroms in Russia and elsewhere in Europe. Livezey, *supra*, n.3, p.138. See also Cyrus Adler and Aaron M.Margalith, *With Firmness in the Right: American Democratic Action Affecting Jews* (New York: Arno Press, 1946).

[58]. Forsythe, *Human Rights and World Politics* (Lincoln: University of Nebraska Press, 1983), Chapter 4.

Consistent and coordinated efforts with foreign policy-makers are essential for NGOs to take effective recourse via State diplomacy against repressive governments. State policy being most likely to be based on national interests, which include "the prestige of a State",[60] NGOs may stress that human rights diplomacy will eventually contribute to that end.[61] NGOs must play a vital role as catalysts in government thinking, such that their initiatives will encourage a longer-term and wider perspective in foreign policy making.

---

[59]. Steiner, *supra*, n.24, p.138. A week after President Carter took office, the International League for Human Rights submitted to the State Department a report of recommendations dealing with human rights in U.S. foreign policy. J.J.Shestack, "Sisyphus Endures: The International Human Rights NGO"(1978), 24 New York Law School Law Review, p.104. For issues of State diplomacy of human rights, which is beyond the scope of this paper, see generally David D.Newman, *The Diplomacy of Human Rights* (New York: University Press of America, 1986). U.S. foreign policy during the Carter administration provides a great deal of discussion of human rights diplomacy, see e.g., Lillich, *supra*, n.55, pp.938-1045.

[60]. See Richard Falk, *Human Rights and State Sovereignty* (New York: Holms and Meier Publishers, Inc., 1981). The author observes national interests as related to the power, security, wealth and prestige of a State. *Ibid.*, p.59.

[61]. With regard to the connection between human rights foreign policy and national interests, Luard's statement is informative:

> [t]he wider and longer-term national interests - in bringing about a world in which fewer people are killed, tortured or imprisoned without reason and more enjoy basic freedoms, including the freedom to have a say in the way they are governed,... - these count little against the immediate aim of not offending existing governments.... Only if these wider aims come to play a much larger role than they have in the past would governments begin to become more active in the protection of human rights elsewhere.

Supra, n.56, p.36.

5. Legal Status of NGOs

Under the status quo, the legal recognition of NGOs in international instruments is so limited as to be found only in Article 71 of the U.N. Charter (consultative status in ECOSOC)[62] and some provisions referring to the status of the International Committee of the Red Cross in the Geneva Conventions of 1949 and Additional Protocol I of 1977.[63] In general, NGOs are not allowed direct access to the major organs of the U.N., such as the General Assembly and Security Council. With a view to furthering their role as human rights actors, as shall be discussed below, efforts should be and are being made toward legal reform to authorize certain activities by NGOs.

a. The Right to Visit Political Prisoners

Although the I.C.R.C. is legally entitled to visit prisoners of war and civilian detainees in international armed conflict,[64] it has no legal basis to visit political prisoners (e.g, victims of civil war or dissidents). In this case it must obtain the consent of the governing authority. While this request is likely to be viewed as a threat to the security of the authority, the I.C.R.C. "has been granted an extraordinary degree of access to political prisoners by the governments that detain them."[65] In fact, its delegates visited almost 100,000 people, including many political detainees, in 54 countries in 1992.[66] Such initiative by the I.C.R.C. has been carried on on the basis of the recognition that all victims of civil war as well as of "social and revolutionary disturbances" are, without any exception whatsoever, entitled to relief in conformity with the general principles of the Red Cross.[67]

---

[62]. See *supra*, Chapter II, pp.81-2.

[63]. See *infra*, n.64 and n.75.

[64]. Article 126 of the Third Convention and Article 143 of the Fourth Convention, see D.Schindler and J.Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Boston: Martinus Nijhoff Publisher, 3rd ed, 1988), p.397, p.468.

Based on "a right of initiative" enshrined in the Geneva Conventions,[68] the I.C.R.C. claims that it has a general right of humanitarian initiative to become involved with the protection of political prisoners. This stance, however, goes beyond the existing provisions of international humanitarian law, relating to non-international armed conflict,[69] which excludes matters in the situation of "international disturbances and tensions."[70] To strengthen its stance, the I.C.R.C. should seek to reform such instruments as the Torture Convention.[71]

---

[65] . J.D.Armstrong, "The International Committee of the Red Cross and Political Prisoners"(1985), 39 International Organization, p.615. See also *supra*, Chapter III, pp.144-6.

[66] . *Red Cross and Red Crescent* (Jan-Apr. 1993), p.4.

[67] . I.C.R.C., *International Red Cross Handbook* (hereinafter Handbook), (Geneva: I.C.R.C., 1971), p.455. The Statutes of the International Red Cross and Red Crescent Movement provide the principles which extend the mandate of the I.C.R.C. to offering its services to people arrested for political or security reasons. *Ibid.*, p.273. See also I.C.R.C., *Commission of Experts for the Examination of the Question of Assistance to Political Detainees* (Geneva: ICRC, 1953), p.2.

[68] . See *infra*, n.75.

[69] . E.g., Article 3 common to the four Geneva Conventions and the Additional Protocol II. For the text, see Schindler and Toman, *supra*, n.64.

[70] . See e.g., Asbjorn Eide, "Internal Disturbance and Tension" in UNESCO ed., *International Dimension of Humanitarian Law* (Paris: Martinus Nijhoff Publisher, 1988), pp.241-55.

[71] . The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984). For the text, U.N., *Human Rights: A Compilation of International Instruments* (New York: U.N. Publication, 1988), ST/HR/1/Rev.3.

Visiting political prisoners, a task undertaked by several NGOs (e.g., Amnesty International and The International League for Human Rights), is in the process of becoming a general practice. The general practice of the I.C.R.C. of visiting prisoners of war and civilian detainees during wartime achieved the status of a customary norm in international law. It was finally codified by the Geneva Conventions. Persistent efforts for peacetime rights should equally elevate the right to visit political prisoners into an international legal norm.

b. The Right to Humanitarian Assistance

As a part of their human rights movements, a number of NGOs appear to be demanding the right to provide humanitarian assistance.[72] Humanitarian assistance, though lacking a generally accepted definition at the moment,[73] has been brought into focus through recent U.N. Security Council initiatives, whereby some resolutions confirmed the special role of the I.C.R.C.[74] The I.C.R.C. has a right, under the relevant Geneva Conventions,[75] to perform humanitarian functions in armed

---

[72] Michael A.Meyer, "Humanitarian Action: A Delicate Balancing Act"(1987), 260 The International Review of Red Cross, p.485.

[73] See Bosko Jakovljevic, "The Right to Humanitarian Assistance: Legal Aspect"(1987), 260 The International Review of Red Cross, p.470. He lists some rights and duties to be settled in relation to such assistance. *Ibid*, p.473.

[74] See *supra*, Chapter III, pp.128-9.

[75] The I.C.R.C.'s humanitarian activities are based largely on "its right of initiative" which is to be found in Article 9 common to the first, second and third Geneva Convention and Article 10 of the fourth Geneva Convention:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross... may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief;

conflict. However, with regard to humanitarian assistance of a general character (including a situation in peacetime), there is no international legal instrument regulating such activities.[76] As may be seen in 1993 in Bosnia, Somalia and Cambodia, the vulnerable situation of relief workers, who have no recognized standing in international law, requires a special protected status with official authorization.

The I.C.R.C. has long rendered such assistance in many situations where the formal applicability of the Geneva Conventions is denied or is irrelevant.[77] The I.C.R.C.'s offer of humanitarian assistance is based on its statutory right of humanitarian initiative[78] which has a wider scope of mandate than that empowered by the I.C.R.C.'s right of initiative in the Geneva Conventions. In the development

---

and Article 81 of Protocol I:

> 1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their powers so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.

In a non-international armed conflict this right of initiative is to be found in Article 3 common to the four Conventions (2nd para.):

> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services the Parties to the conflict.

[76] There are certain model agreements for peacetime disaster relief, such as the Model adopted by the International Law Association in 1980, the Model Rules for Disaster Relief Operations proposed by Unitar in 1982, and the Catholic Relief Services Model Agreement. These models, however, have not led to the creation of a new legal instrument. See Committee on International Medical and Humanitarian Law, International Law Association, *Special Report on a Draft Model Agreement for Humanitarian Relief Operations* (1980); M.El Baradei et al., *Model Rules for Disaster Relief Operations* (1982) 8 Policy and Efficacy Studies, United Nations Institute for Training and Research (Unitar). See also Jakovljevic, *supra*, n.73, pp.479-82; Meyer, *supra*, n.72, p.486.

[77] Meyer, *ibid.*, pp.489-90.

[78] Article 4 of Statutes of the International Committee of the Red Cross, see *supra*(Handbook), n.67, pp.288-9.

of international humanitarian law, this kind of gap between two instruments has been gradually narrowed by the I.C.R.C.'s progressive activities urging governments in the direction that the Committee desires. Armstrong observes that:

> the I.C.R.C. has employed such techniques as suggesting that its own statutes form part of international law, advancing somewhat liberal interpretations of certain provisions of the Geneva Conventions, attempting to establish new precedents by its own actions, and generally working to help create new customary law.[79]

By elaborating on the definition of humanitarian assistance, the I.C.R.C. should urge that the right to humanitarian assistance be codified, via consolidation of its own statutory right of humanitarian initiative, in a new international legal instrument, giving it to a status similar to that which it enjoys during armed conflict.

c. The Official Status of Access to the International Organs

Within the U.N. structure, NGOs are merely entitled to enjoy "consultative status"[80] in the Economic and Social Council. With few exceptions in which the Commission on Human Rights and the Committee on Non-Governmental Organizations has granted the NGOs participant status by the rules of procedure, such status does not entitle the holder to speak on its own initiative to the U.N. organs.

Recognizing its unique role in international relations, described as having a

---

[79]. Armstrong, *supra*, n.65, p.621.

[80]. See *supra*, Chapter II, pp.81-2.

"functional international personality,"[81] the I.C.R.C. was granted "observer status" by a resolution adopted by the General Assembly in 1990.[82] The resolution invites the I.C.R.C. to "participate in the sessions and the work of the General Assembly in the capacity of observer."[83]

The privileges conferred upon the I.C.R.C., however, are not equal to those of other categories of observers, such as non-member States of the U.N. (e.g., Switzerland) and regional inter-governmental organizations (e.g., the Organization of African Unity and the Organization of American States), which may enjoy unlimited access to virtually all U.N. fora.[84] The limited access conferred on the I.C.R.C. stems from its "confidential policy"[85] which precludes reciprocal access between the I.C.R.C. and the U.N. organs, as seen in the relationship between

---

[81]. "Functional international personality" derives from the special status of the I.C.R.C. recognized by the Geneva Conventions (e.g., a humanitarian substitute of a Protecting Power in international armed conflict and a right of initiative) as well as from the established practice that the I.C.R.C. is in a position to sign headquarters agreements with a State for maintaining its activities. Its unique role is also found in its quasi-official work in law-making of Geneva Conventions, in particular, the Additional Protocols of 1977 in which the I.C.R.C. played a major role from drafting to assisting to convene the diplomatic conferences. See Christian Koenig, "Observer Status for the International Committee of the Red Cross at the United Nations"(1991), 280 The International Review of Red Cross, p.39 See also *supra*, Chapter II, pp.62-6.

[82]. Resolution 45/6, General Assembly Official Records: Forty-fifth Session Supp. No.49 A (A/45/49), at 16. (October 16, 1990, Observer Status for the International Committee of the Red Cross, in Consideration of the Special Role and Mandates Conferred upon It by the Geneva Conventions of 12 August 1949).

[83]. *Ibid.*

[84]. Erik Suy, "The Status of Observers in International Organizations"(1978/II), 160 Recueil des Cours de l'Academie de Droit international, p.103; Koenig, *supra*, n.81, pp.43-48. The extent of access to and participation in the U.N. bodies depends on the nature and function of the observer. *Ibid.*

[85]. The I.C.R.C.'s "secret diplomacy" in its work of fact-finding and relief operation, where the I.C.R.C. submits its reports only to the host government, leads to the most successful dialogue with the government concerned. See *supra*, Chapter III, pp.144-6.

ECOSOC and the special agencies under Article 70 of the U.N. Charter.[86] Accordingly, observer status itself is not sufficient to enforce the NGO's work in the U.N. fora.

With regard to the capacity to address international tribunals, NGOs, regardless of their formal status in the U.N., are neither able to be a party in a case[87] nor, unlike international organizations,[88] able to provide information before the World Court.[89] This is in contrast to the European regime of two regional courts (the European Court of Human Rights and the European Court of Justice), whereby NGOs may, at the request of the Party concerned or the Court, submit information or express opinion to the Courts.[90]

---

[86] Article 70 of the Charter reads:

> The Economic and Social Council shall make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it and for its representatives to participate in the deliberations of the specialized agencies.

[87] See e.g., Shabtai Rosenne, *The Law and Practice of the International Court* (Boston: Martinus Nijhoff Publishers, 1985), p.269.

[88] Public international organizations are entitled to submit information to the Court. Article 34 (2) in the Statute of the International Court of Justice reads:

> The Court, subject to aid in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

[89] During the course of the proceedings in the *Asylum Case*, the International League for the Rights of Man (currently renamed the International League for Human Rights) inquired whether or not Article 34 could apply to an NGO, and the Court denied its applicability. *Asylum Case* [1950], Pleadings, Vol.II, pp.227-8.

[90] Rule 40 of the Rules of the Court of Human Rights (revised on 24 November 1982) empowers the Chamber to obtain information, opinion or report from "any person or institution of its choice." For the text, see *European Convention on Human Rights: Collected Text* (Dordrecht: Martinus Nijhoff Publishers, 1987), pp.151-180. With regard to the Court of Justice, under Article 45(2) of the Rules of Procedure, the Court may obtain "expert opinion" for its investigation from "any individual, body, authority, committee of other organization it chooses" in accordance with the relevant Statutes (Article 25 of the ECSC Statute, 22 of the EEC Statute and 23 of the Euratom Statute). For the text of The

Should an international criminal or military tribunal[91] be founded in the near future,[92] it may provide a possibility for NGO intervention. According to a Draft International Criminal Code,[93] Article VI (Judicial Assistance), which is based on the relevant provision of the European Convention on Mutual Assistance in Criminal Matters (1959)[94], provides that a party may invite a "witness or expert" to appear on a summons before the judicial authorities.[95] In light of the fact that NGOs are in a position to collect direct and detailed information by their relief activities and by their grass-roots network, the NGOs, if summoned as a witness, could be of great help. In addition, for the sake of establishing more reliable evidence, the draft code should be elaborated to accept NGOs' reports as in the European judicial system.

Rules, see The Europa Institut of the University of Leyden, *The Rules of Procedure of the Court of Justice of the European Communities* (tr., L.J.Brinkhorst and G.M. Wittenberg, Leyden: A.W.Sythoff, 1962); For the relevant statutes, see e.g., Edward H.Wall, *The Court of Justice of the European Communities: Jurisdiction and Procedure* (London: Butterworths, 1966).

[91]. The idea of the creation of the international criminal court has been long discussed since the end of World War I. Despite numerous attempts by unofficial bodies and U.N. organs, such an idea has not led to such a court being estabished. The only two precedents in this respect are to be found in *ad hoc* International Military Tribunals established in Nuremberg and Tokyo in the aftermath of World War II. See e.g., M.C.Bassiouni, *International Criminal Law: A Draft International Criminal Code* (Alphen aan den Rijn, The Netherlands: Sijthoff and Noordhoff, 1980), pp.22-27.

[92]. With regard to the Gulf war in 1991, L.C.Green points to the possibility of establishing an International Military Tribunal against war criminals. Green, "Iraq, the U.N. and the Law"(1991), 29 Alberta Law Review, pp.570-71. The U.N. Security Council adopted the resolution 808 (on Feb. 22, 1993) which approved creation of the international war crimes tribunal to try those responsible for atrocities in the conflict in former Yugoslavia. *The [London] Times* (23 Feb. 1993) 9A.

[93]. See Bassiouni, *supra*, n.91, pp.49-174.

[94]. 472 *United Nations Treaty Series* (1963), at 185.

[95]. Bassiouni, *supra*, n.91, p.119.

Given the above, there appears to be no reason why the World Court must exclude NGOs from the context of Article 34 of the Statute which grants only inter-governmental organizations the right to submit information to the Court.[96] The provision should be ammended to grant NGOs a status similar to inter-governmental organizations.

C. The Endless Struggle toward an International Conscience

Respect for fundamental human rights has been at the heart of the world community under the U.N. human rights regime, though the reality is far from ideal. There is no doubt that the repression of human rights has been on the increase and such practice is made even by governments who consider themselves civilized.[97] As a recent Annual Report by Amnesty International says,

> [t]he governments of the world stand in danger of sabotaging the hope of a new era for human rights - a hope for which millions of ordinary people are struggling, often risking their lives. Some governments are sabotaging it by the violations they commit directly; others by the selectivity with which they exert their influence. Even those governments which are committed to protecting the rights of their own citizens have other interests to pursue in their foreign relations.[98]

From a global perspective, despite the persistent and resilient works undertaken by NGOs for the past several decades, factors that endanger social stability, such as the increasing gap between rich and poor within and between societies and confrontations between ethnic groups, are overwhelming non-governmental initiatives. As a consequence, the motivation to retain power and privilege is enhanced and a tension resulting from the exclusive corrective identity of peoples is escalating in many countries.

---

[96] At the San Francisco Conference in 1945, which drafted the present Statute, NGOs were regarded as the same personality as individuals whose procedural capacity was totally denied. Rosenne, *supra*, n.87, pp.284-90. The Statute was completed under an atmosphere of the traditional concept of international litigation that only States possess an international personality. Rosenne, *The World Court: What It Is and How It Works* (Dordrecht; Martinus Nijhoff Publishers, 1989), p.83.

[97] Joyce, *supra*, n.19, p.83.

[98] A.I., *Annual Report* (New York: Amnesty International Publication, 1991), p.2.

Being a complex issue composed of political, socio-economic, and national security factors, the international protection of human rights will remain politicized and thus controversial. Stanley Hoffman notes that:

> [t]he issue of human rights, by definition, breeds confrontation. Raising the issue touches on the very foundations of a regime, on its sources and exercise of power, on its links to its citizens or subjects. It is a dangerous issue.[99]

Similarly, in terms of an institutional protection at the universal level, John Humphrey stresses that "[h]uman rights cannot... be divorced from politics."[100]

The controversial nature of human rights issues also stems from the collision of "self-interests of States" and "ideals of humanity." Amnesty International's actions are based on the basic recognition that "human rights concerns become the short-term beneficiary of [State] self-interests; more often they become the casualty of political expediency."[101]

Humanity has a moral impetus which has advanced international human rights movements while nurturing the "international conscience" of ordinary people. The international conscience can be described as a worldwide recognition of essential humanity and dignity of all people who can enjoy a decent life.[102] This idea may also necessitate a sense of obligation that, in L.C.Green's words, "the ordinary man [shall] accept[] a sense of responsibility for his fellows and a feeling of personal loss when the latter is injured."[103]

---

[99]. Hoffman, "The Hell of Good Intention"(1977-78), 29 Foreign Policy, p.8.

[100]. Humphrey, "The International Bill of Rights: Scope and Implementation"(1976), 17 William and Mary Law Review, p.532.

[101]. A.I., *supra*, n.98.

The international conscience represented by international human rights movements, though under severe pressure from the parochial interests of States, has survived and steadily disseminated into the international community. Governments on the one hand have consistently attempted to restrain the progress of those movements in particular within the U.N. arena. On the other hand, such restraints by governments regarding and their sensitivities to human rights matters concerning their own citizens show that governments "feel compelled to pay [such rights] the homage of hypocrisy."[104]

State hypocrisy has been lessened somewhat over years due to pressure by non-governmental forces.[105] This offers the possibility of hope to NGOs engaging in the endless struggle against human rights violations. Encouragement for human rights non-governmental actors is drawn from the words of philosopher-historian

---

[102]. See G.Shepherd, "Transnational Development of Human Rights" in V.P.Nanda ed., *supra*, n.2, p.215.

[103]. Green, *Law and Society* (Dobbs Ferry, New York: Oceana Publications, Inc., 1975), p.275.

[104]. Henkin, *supra*, n.9, p.514.

[105]. On the subject of how State hypocrisy can lead to beneficial change, see *ibid*.

Isaiah Berlin:

> But men do not live only by fighting evils. They live by positive goals, individual and collective, a vast variety of them, seldom predictable, at times incompatible. It is from intense preoccupation with these ends, ultimate, incommensurable, guaranteed neither to change nor to stand still - it is through the absorbed individual and collective pursuit of these, unplanned and at times without wholly adequate technical equipment, more often than not without conscious hope of success, still less of the approbation of the official auditor, that the best moments come in the lives of individuals and peoples.[106]

NGOs have a special responsibility and challenge to help expedite the advancement of the international human rights movement. At the same time they must continue to secure and represent the international conscience. There is no sudden and immediate victory, but there will be honour in striving for it.

---

[106]. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), p.40.

BIBLIOGRAPHY

BOOKS

Aaron, Richard. *John Locke* (London: Oxford University Press, 1937)

A.I. *Annual Report* (New YorK: Amnesty International Publication, 1991)

A.I. *Amnesty International Report* (New York: Amnesty International, 1992)

Asher, Robert E. et al, *The United Nations and Promotion of the General Welfare* (Washington D.C.: The Brookings institution, 1957)

Bassiouni, M.C. *International Criminal Law: A Draft International Criminal Code* (Alphen aan den Rijn, The Netherlands: Sijthoff and Noordhoff, 1980)

Bayefsky, A. *International Human Rights Law* (Toronto/ Vancouver: Butterworth, 1991)

Bentham, J. *Anarchical Fallacies*, in J.Bowring ed., *The Works of Jeremy Bentham* (Edinburgh: Tait, 1843), Vol.II

Berlin, Isaiah. *Four Essays on Liberty* (Oxford: Oxford University Press, 1969)

Bodenheimer, E. *Jurisprudence* (Cambridge: Harvard University Press, 1974)

Brierly, J.L. *The Law of Nations* (Oxford: Clarendon Press, 6th ed., 1963)

Brownlie, Ian. *Principles of Public International Law* (Oxford: Clarendon Press, 4th ed., 1990)

--- *Basic Documents of Human Rights* (Oxford: Clarendon Press, 3rd ed, 1992)

Burke, E. *Reflections on the Revolution in France, Work* (Boston: Franklin Press, 1852)

Caire, G. *Freedom of Association and Economic Development* (Geneva: ILO, 1977)

Chatterjee, Satischandra. *The Fundamental of Hinduism: A Philosophical Study* (Calcutta: Das Gupta and Company, 1950)

Chiang, Pei-heng. *Non-Governmental Organizations at the United Nations: Identity,* *Role, and Function* (New York: Praeger Publishers, 1981)

Claude, I.L. *National Minorities* (Cambridge: Harvard University Press, 1955)

Claude.R.P. and B.H.Weston, *Human Rights in the World Community: Issues and Action* (Philadelphia: University of Pennsylvania Press, 1989)

The Council of Europe, *European Convention on Human Rights: Collected Text* (Dordrecht: Martinus Nijhoff Publishers, 1987)

Cranston, M. *What are Human Rights ?* (London: The Bodley Head, 1973)

D'Entreves, Passerin. *Natural Law* (London: Hutchinson's University Library, 1951)

Donnelly, Jack. *Universal Human Rights in Theory and Practice* (New York: Cornell University Press, 1989)

Driessen, Bart. *A Concept of Nation in International Law* (The Hague: T.M.C. Asser Institut, 1992)

Dumont, Louis. *Homo Hierarchicus: The Caste System and Its Implications* (Chicago: University Chicago Press, 1980)

The Europa Institut of the University of Leyden, *The Rules of Procedure of the Court of Justice of the European Communities* (tr., L.J.Brinkhorst and G.M. Wittenberg, Leyden: A.W.Sythoff, 1962)

Falk, Richard. *Human Rights and State Sovereignty* (New York: Holms and Meier Publishers, Inc., 1981)

Ferencz, Benjamin B. *An International Criminal Court: A Step Toward World Peace - A Documentary and Historical Analysis* (New York: Oceana Publications, Inc., 1980), Vol.1.

Finnis, J. *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980)

Forsythe, David P. *Present Role of the Red Cross in Protection: Background Paper No.1* (Geneva: ICRC, 1975)

--- *Humanitarian Politics* (Baltimore/London: John Hopkins University Press, 1977)

--- *Human Rights and World Politics* (Lincoln: University of Nebraska Press, 1983)

--- *The Internationalization of Human Rights* (Massachusetts: Lexington Books, 1991)

Friedmann, W. *Law in a Changing Society* (London: Stevens and Sons Limited, 1959)

George, Lloyd. *The Truth about the Peace Treaties* (London: V.Gollancz, 1938)

Gewirth, A. *Reason and Morality* (Chicago: University of Chicago Press, 1978)

Goodrich, L.M. *The United Nations* (New York: Thomas Y.Crowell, 1959)

--- et al, *The Charter of the United Nations* (New York: Columbia University Press, 3rd ed, 1969)

Green, L.C. *Law and Society* (New York: Oceana Publication Inc., 1975)

--- *International Law: A Canadian Perspective* (Ontario: the Carswell Company Ltd., 2nd ed, 1988)

Greenidge, C.W.W. *Slavery* (London: George Allen and Unwin Ltd., 1958)

Grotius, Hugo. *De Jure Belli et Pacis* (1625), Bk.I, (Carnegie tr.: New York: Oceana Publication Inc., 1964)

Guest, Iain. *Behind the Disappearance: Argentina's Dirty War Against Human Rights and the United Nations* (Philadelphia: University of Pennsylvania Press, 1990)

Hannikainen, Lauri. *Peremptory Norms (Jus Cogens) in International Law* (Helsinki: Finnish Lawyers' Publishing Company, 1988)

Haque, Tamizul. *Human Rights in Islam Vis-a-Vis Universal Declaration of Human Rights of the United Nations* (Washington D.C.: The World Peace through Law Center, 1981)

Henkin, Louis. *The Rights of Man Today* (Colorado: Westview Press, 1978)

--- *International Law: Cases and Materials* (Minnesota: West Pub. Co., 1980)

Hertslet, E. *Map of Europe by Treaty* (Farnborough: Gregg International Pub., 1969), Vol.II

Hucko, Elmer M. *The Democratic Tradition: Four German Constitutions* (New York: St.Martin's Press, 1989)

Humphrey, John. *No Distant Millennium: The International Law of Human Right* (Paris: UNESCO, 1989)

Hurst. M. *Key Treaties for the Great Powers* (Newton Abbot: David and Charles, 1972) Vol.2

I.C.J., *Human Rights in Islam* (Geneva: ICJ, 1982)

--- *Human Rights and Mental Patients in Japan: Report of a Mission on Behalf of the International Commission of Jurists and the International Commission of Health Professionals* (Geneva: ICJ, 1985)

--- *Report on Activities, 1986-1988* (Geneva: ICJ, 1988)

I.C.R.C., *International Red Cross Handbook* (Geneva: ICRC, 1971)

--- *Commission of Experts for the Examination of the Question of Assistance to Political Detainees* (Geneva: ICRC, 1953)

I.L.H.R., *Annual Review* (New York: ILHR, 1976-77)

--- *Report of Commission of Enquiry into Human Rights in Paraguay* (New York: ILHR, Sept. 1976)

I.L.O., *International Labour Conventions and 1919-1981* (Geneva: I.L.O., 1982)

Jack, Homer A. *The Human Rights Commission at Geneva* (New York: World Conference on Religion and Peace, 1975)

Jenks, C.W. *International Protection of Trade Union Freedoms* (London: Stevens and Sons, 1957)

--- *Law, Freedom and Welfare* (London: Stevens and Sons, 1963)

Jessup, P.C. *A Modern Law of Nations* (New York: Macmillan Co.,1948)

Johnston, G.A. *The International Labour Organization* (London: Europa Publications, 1970)

Joyce, James A. *The New Politics of Human Rights* (New York: St.Martin's Press, 1978)

Kamenka, E. and A.E.S.Tay, *Human Rights* (London: E.Arnold, 1978)

Kelsen, H. *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: Stevens and Sons, 1950)

Landy, E. *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience* (London: Stevens and Sons, 1966)

Lauterpacht, H. *An International Bill of the Rights of Man* (New York: Columbia University Press, 1945)

--- *International Law and Human Rights* (Connecticut: Archon Books, 1968)

--- *International Law: Collected Papers I* (London: Cambridge University Press, 1970)

Lerner, Natan. *Group Rights and Discrimination in International Law* (Boston: Martinus Nijhoff Publishers, 1991)

Lillich, Richard B. and Frank C.Newman, *International Human Rights: Problems of Law and Policy* (Boston: Little, Brown and Company, 1979)

Lillich, R.B. *International Human Rights: Problems of Law, Policy and Practice* (Boston: Little, Brown and Company, 2nd ed, 1991)

Little, David. et al, *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (Columbia: University of South Carolina Press, 1988)

Livenzey, Lowell W. *Nongovernmental Organizations and the Ideas of Human Rights* (New Jersey: The Center of International Studies Princeton University, 1988)

Luard, Evan. *Human Rights and Foreign Policy* (Oxford: Pergamon Press, 1981)

Mckean, Warwick A. *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983)

Meron, Theodor. *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1989)

Mill, J.S. *On Liberty* (1880, reprinted by Oxford: Blackwell, 1946)

Miller, David H. *The Drafting of the Covenant* (New York: Johnson Reprint, 1969), Vol.2

Newman, David D. *The Diplomacy of Human Rights* (New York: University Press of America, 1986)

Newman, Frank. and D.Weissbrodt. *International Human Rights: Law, Policy and Process* (Cincinnati: Anderson Publishing Co., 1990)

Nitobe, Inazo. *Bushido: The Soul of Japan* (Rutland, Vermont and Tokyo: Charles E.Tuttle Company, 1969)

Nolde, O. *Free and Equal Human Rights in Ecumenical Perspective* (1968)

Oppenheim, L. *International Law: A Treatise* (London: Longman Green and Co., 1905)

Phillipson, Coleman. *International Law and Custom of Ancient Greece and Rome* (London: MacMillan, 1911) Vol.1

Pictet, Jean. *Commentary to the Geneva Conventions of August 1949 Vol.1 - Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952)

Ramcharan, B.G. *The Concept and Present Status of the International Protection of Human Rights: Forty Years after the Universal Declaration* (Dordrecht: Martinus Nijhoff Publishers, 1989)

Ritchie, D.G. *Natural Rights* (Connecticut: Hyperion Press, 1879, reprint of the 1952 ed., published by London: G.Allen and Unwin)

Robertson, A.H. *Human Rights in the World* (Manchester: Manchester University Press, 1st ed., 1972)

--- *Human Rights in the World* (New York: Manchester University Press, 3rd ed., 1989)

Rohn, P. *Relations Between the Council of Europe and International Non-governmental Organizations* (Brussels: Union of International Associations, 1957)

Roling, B.V.A. *International Law in an Expanded World* (Amsterdam: Djambatan N.V., 1960)

Rommen, Heinrich. *The Natural Law* (London: B.Herder Book Co., 1947)

Rosenne, Shabtai, *The Law and Practice of the International Court* (Boston: Martinus Nijhoff Publishers, 1985)

Roth, Andreas H. *The Minimum Standards of International Law Applied to Aliens* (Leyden: Sijthoff, 1949)

Schindler, D. and J.Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Boston: Martinus Nijhoff Publishers, 3rd ed., 1988)

Scott, James B. *Resolutions of the Institute of International Law: Dealing with the Law of Nations* (New York: Oxford University Press, 1916)

Steiner, Henry J. *Diverse Partner: Non-Governmental Organizations in the Human Rights Movements* (Massachusetts: Harvard Law School Human Rights Program and Human Rights Internet, 1991)

Stwell, Lord. *The Le Louis* (1817), 2 Dods.

Tabandeh, S. *A Muslim Commentary on the Universal Declaration of Human Rights* (Guilford, England: F.J.Goulding, 1970)

Tabata, Shigejiro. *Internationalization of Human Rights (Kokusaikajidai-no-Jinkenmondai)* (Tokyo: Iwanami-shoten, 1988)

Tanaka, Hideo. *Japanese Legal System* (Tokyo: University of Tokyo Press, 1975)

Teson, Fernando. *Humanitarian Intervention: An Inquiry into Law and Morality* (New York: Transnational Publication, 1988)

Thornberry, Patrick. *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991)

Tolley, Howard Jr., *The U.N. Commission on Human Rights* (Boulder, Colorado: Westview Press, 1987)

Toynbee, Arnold J. *A Study of History* I (London: Oxford University Press, 1947:

Abridgement of Volume I-IV by D.C.Somervell)

U.N., *Human Rights: A Compilation of International Instruments* (New York: U.N. Publication, 1988), ST/HR/1/Rev.3

Vattel, E. *Le Droit des Gens* (1758), (Carnegie tr.: Oxford: Clarendon Press, 1916)

Vitoria, Francisco de. *De Indis Noviter Inventis* (1532), (J.B.Scott, *The Spanish Origin of International Law, Part I, Francisco de Vitoria and his Law of Nations* (Oxford: Clarendon Press, 1934)

Wall, Edward H. *The Court of Justice of the European Communities: Jurisdiction and Procedure* (London: Butterworth, 1966)

Walters, F.P. *A History of the League of Nations* (London: Oxford University Press, 1952)

Zimmern, A. *The League of Nations and the Rule of Law 1918-1935* (New York: Russell and Russell, 1969)

Zolbrod, L.M. *Takizawa Bakin* (New York: Twayne Publishers, 1967)

ARTICLES

Adachi, Sumio. "The Asian Concept" in UNESCO ed., *International Dimension of Humanitarian Law* (Paris: Martinus Nijhoff Publisher, 1988) 13.

Alfredson, G and Zayas, A. "Minority Rights: Protection by the United Nations"(1993), 14 Human Rights Law Journal 1.

Anderson, S. "Human Rights and the Structure of International Law"(1991), 12 New York Law School Journal of International and Comparative Law 1.

Archer, Peter. "Action by Unofficial Organizations on Human Rights" in Evan Luard ed., *International Protection of Human Rights* (London: Thames and Hudson, 1967) 160.

Armstrong, J.D. "The International Committee of the Red Cross and Political Prisoners"(1985), 39 International Organization 615.

Ascher, "The Economic and Social Council Reviews Consultative Status of Non-Governmental Organizations"(1968), 20 Int'l A. 27.

Baehr, Peter R. "The General Assembly: Negotiating the Convention on Torture" in David P. Forsythe ed., *The United Nations in the World Political Economy* (New York: St.Martin's Press, 1989) 36.

Bartolomei, M. and D.Weissbrodt, "The Impact of Factfinding and International Pressure on Human Rights Situation in Argentina, 1976-83" in Newman and Weissbrodt ed., *International Human Rights: Law, Policy, and Progress* (Cincinnati: Anderson Publishing Co., 1990) 244.

Bayefsky, Anne F. "The Human Rights Committee and the Case of Sandra Lovelace"(1982), 20 The Canadian Yearbook of International Law 244.

--- "Human Rights: The 1966 Covenants Twenty Years Later"(1986), 80 Proceedings of the American Society of International Law 408.

Bossuyt, M. "The Development of Special Procedures of the United Nations Commission on Human Rights"(1985), 6 Human Rights Law Journal 179.

Bourloyannis, Christiane. "The Security Council of the United Nations and the Implementation of International Humanitarian Law"(1992), 20 Denver Journal of International Law and Policy 335.

Bradley, F.H. "Some Remarks on Punishment"(1894), International Journal of Ethics, reprinted in *Collected Essays* Vol.I (Oxford: Clarendon Press, 1935) 149.

Buergenthal, Thomas. "International and Regional Human Rights Law and Institutions: Some Examples of Their Interactions"(1977), 12 Texas International Law Journal 321.

Burgers, Jan H. "The Road to San Francisco: the Revival of the Human Rights Idea in the Twentieth Century"(1992), 14 Human Rights Quarterly 447.

Buultjens, Ralph. "Human Rights in Indian Political Culture" in Kenneth W.Thompson ed., *The Moral Imperatives of Human Rights: A World Survey* (Washington: University Press of America, 1980) 109.

Cassese, Antonio. "Two United Nations Procedures for the Implementation of Human Rights" in J.C.Tuttle ed., *International Human Rights Law and Practice: The Role of the UN, the Private Sector, the Government, and their*

Lawyers (Washington: American Bar Association, 1978) 44.

--- "How Could Nongovernmental Organizations Use U.N. Bodies More Effectively?"(1979), 1 Universal Human Rights 73.

--- "Progressive Transnational Promotion of Human Rights" in B.G.Ramcharan ed., *Human Rights: Thirty Years After the Universal Declaration* (The Hague: Martinus Nijhoff Publisher, 1979) 249.

Castberg, F. "Natural Law and Human Rights: An Idea-Historical Survey" in Asjorn Eide and August Schou ed.,*International Protection of Human Rights* (Stockholm: Almquvist and Wiksell, 1967) 13.

Cobbah, Josiah A.M. "African Values and Human Rights Debate: An African Perspective"(1987), 9 Human Rights Quarterly 309.

Das, Kamleshwar. "Some Reflections on Implementing Human Rights" in B.G.Ramcharan ed.,*Human Rights: Thirty Years After the Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1979) 131.

Dean, Richard N. "Nongovernmental Organizations: the Foundation of Western Support for the Human Rights Movement in the Soviet Union" in R.P.Claude and B.H.Weston ed., *Human Rights in the World Community: Issues and Action* (Philadelphia: University of Pennsylvania Press, 1989) 299.

Delbruck, Jost. "A Fresh Look at Humanitarian Intervention under the Authority of the United Nations"(1992), 67 Indiana Law Journal 887.

Dinstein, Yoran. "Collective Human Rights of Peoples and Minorities" (1976), 25 International and Comparative Law Quarterly 102.

Donnelly, Jack. "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights"(1982), 76 American Political Science Review 303

Draper, G.I.A.D. "The Development of International Humanitarian Law" in UNESCO ed., *International Dimension of Humanitarian Law* (Paris: Martinus Nijoff Publishers, 1988) 67.

Eide, Asbjorn. "Internal Disturbance and Tension" in UNESCO ed., *International Dimension of Humanitarian Law* (Paris: Martinus Nijhoff Publisher, 1988) 241.

Ermacora, Felix. "Human Rights and Domestic Jurisdiction (Article 2, sec.7, of the Charter)"(1968), 124 Recueil Des Cours bk.II 373.

Fegly, R., "The U.N. Human Rights Commission: The Equatorial Guinea Case"(No.1, 1981), 3 Human Rights Quarterly 34.

Field, A.Belden. and Wolf-Dieter Narr, "Human Rights as a Holistic Concept"(1992), 14 Human Rights Quarterly 1.

Fischer, Dana D. "Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee"(1982), 76 American Journal of International Law 142.

Forsythe, David.P. "The Red Cross as Transnational Movement: Conserving and Changing the Nation-State System"(1976), 30 International Organization 607.

--- and L.Wiseberg, "Human Rights Protection: A Research Agenda"(Oct-Dec. 1979), 1 Universal Human Rights 1.

--- "The United Nations and Human Rights, 1945-1985"(1985), 100 Political Science Quarterly 249.

Franck, Thomas M. "Great Expectation: An Exploration of the Exaggerated Hopes Aroused by the U.S. Campaign for Ratification of the U.N. Charter" in T.Buergenthal, ed., *Contemporary Issues in International Law* (Kehl: N.P.Engel Publisher, 1984) 291.

Friedlander, Robert A. "Human Rights Theory and NGO Practice: Where Do We Go From Here?" in Nanda et al ed., *Global Human Rights: Public Policies, Comparative Measures, and NGO Strategies* (Boulder, Colorado: Westview Press, 1981) 219.

Ghandhi, P.R. "The Human Rights Committee and the Right of Individual Communication" (1986), 57 The British Yearbook of International Law 201.

Green, Leslie. "Two Views of Collective Rights"(1991), 4 Canadian Journal of Law and Jurisprudence 315.

Green, L.C. "Human Rights and Colour Discrimination"(1950), 3 The International Law Quarterly 422.

--- "Human Rights and the Colour Problem"(1959), 3 Current Legal Problems

236.

--- "Protection of Minorities in the League of Nations and the United Nations" in A. Gotlieb ed., *Human Rights, Federalism and Minorities* (Lindsey/Ontario: John Deyell Ltd., 1970) 180.

--- "Institutional Protection of Human Rights"(1986), 16 Israel Year Book on Human Rights 69.

--- "Iraq, the U.N. and the Law"(1991), 29 Alberta Law Review 560.

--- "Group Rights, War Crimes and Crime against Humanity"(1993), 2 International Journal on Group Rights 27.

Haas, Ernst. "Human Rights: To Act or Not to Act?" in Kennth A.Oye et al ed., *Eagle Entangled: U.S. Foreign Policy in a Complex World* (New York: Longman, 1979) 188.

Hay, A. "The ICRC and International Humanitarian Issue"(1982), 283 The International Review of Red Cross 1.

Henderson, Conway. "Human Rights and Regime: A Bibliographical Essay"(1988), 10 Human Rights Quarterly 525.

Henkin, Louis. "The United Nations and Human Rights"(1965), 19 International Organization 504.

Higgins, R. "Derogations under Human Rights Treaties" (1976-77), 48 British Yearbook of International Law 281.

Hill, Christopher. "Implication of the World Society Perspectives for National Foreign Policies" in Michael Bank ed., *Conflict in World Society* (New York: St.Martin's Press, 1984) 174.

Hoffman, Stanley. "The Hell of Good Intention"(1977-78), 29 Foreign Policy 3.

Howard, Rhoda E. "Group versus Individual Identity in the African Debate on Human Rights" in Adbullahi A.AnNaim and Francis M.Deng ed., *Human Rights in Africa* (Washington D.C.: The Brookings Institution, 1990) 159.

--- and Jack Donnelly, "Human Dignity, Human Rights, and Political Regimes"(1986), 80 American Political Science Review 801.

Human Rights Internet, "Japan: The Treatment of the Mental Ill"(1984), 10 Human Rights Internet Reporter 223.

Humphrey, John. "The U.N. Charter and the Universal Declaration of Human Rights" in Even Luard ed., *International Protection of Human Rights* (London: Thames and Hudson, 1967) 39.

--- "The International Law of Human Rights in the Middle Twentieth Century" in M.Bos ed., *The Present State of International Law and Other Essays* (Kluwer: Deventer, 1973) 75.

--- "The International Bill of Rights: Scope and Implementation"(1976), 17 William and Mary Law Review 527.

I.C.J., "Japan's Denationalization of the Korean Minority"(1982), 29 The ICJ Review 28.

Iwasaka, Yuji. "Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law"(1986), 8 Human Rights Quarterly 131.

Jakovljevic, Bosko. "The Right to Humanitarian Assistance: Legal Aspect"(1987), 260 The International Review of Red Cross 469.

Kamminga, Menno. and Nigel S.Rodley, "Direct Intervention at the UN: NGO Participation in the Commission on Human Rights and Its Sub-Commission" in Hurst Hunnum ed., *Guide to International Human Rights Practice* (Philadelphia: University of Pensylvania Press, 1984) 186.

Khadduri, Majid. "Human Rights in Islam"(1946), 243 The Annals of American Academy and Political and Social Science 77.

Khushalani, Yougindra. "Human Rights in Asia and Africa"(1983), 4 Human Rights Law Journal 403.

Koenig, Christian. "Observer Status for the International Committee of the Red Cross at the United Nations"(1991), 280 The International Review of Red Cross 37.

Kunz, J.L. "The United Nations Declaration of Human Rights"(1949), 43 American Journal of International Law 316.

Kwa, Tion Kwa. "Righteous Talk" *Far Eastern Economic Review* (June 17 1993) 28.

Lauterpacht, H. "The Subjects of the Law of Nations"(1947,48), 63, 64 The Law Quarterly Review 438 and 97.

Leary, Virginia A. "A New Role for Non-Governmental Organizations in Human Rights: A Case Study of Non-Governmental Participation in the Development of International Norms on Torture" in A.Cassese ed., *UN Law/Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn - The Netherlands: Sijthoff and Noordhoff, 1979) 197.

--- "The Effect of Western Perspective on International Human Rights" in An-Naim and Deng ed., *Human Rights in Africa* (Washington D.C.: The Brookings Institution, 1990) 15.

MacBride, Sean. "The Strengthening of International Machinery for the Protection of Human Rights" in A.Eide and A.Schou ed., *International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium* (Stockholm: Almqist and Wiksell, 1967) 149.

MacDermot, Niall. "The Role of NGOs in Human Rights Standard-Setting" (1991), 90/1 Bulletin of Human Rights 42.

Mackie, J.L. "Can There be a Right-Based Moral Theory?" in J.Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) 168.

Marie, Jean-Bernard, "International Instruments relating to Human Rights"(1993), 14 Human Rights Law Journal 57.

Meron, Thedor. "On a Hierarchy of International Human Rights"(1986), 80 American Journal of International law 1.

Meyer, Michael A. "Humanitarian Action: A Delicate Balancing Act"(1987), 260 The International Review of Red Cross 485.

Mitra, Kana. "Human Rights in Hinduism"(1982), 19 Journal of Ecumenical Studies 77.

Moller, J. "Petitioning the United Nations"(No.4, 1979), 1 Universal Human Rights 57.

Nanda, Ved P. "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti - Revisiting the Validity of Humanitarian Intervention under International Law - Part I"(1992), 20 Denver Journal of International Law and Policy 305.

Nasr, Seyyed H. "The Concept and Reality of Freedom in Islam and Islamic Civilization" in Alan S.Rosenbaum ed., *The Philosophy of Human Rights : International Perspective* (Connecticut: Greenwood Press, 1980) 95.

Neier, Arych. et al, "Transitions in the Midst of Crisis: the Role of Non-governmental Organizations"(1990), 5 American University Journal of International Law and Policy 970.

Newman, F. "The New United Nations Procedures for Human Rights Complaints; Reform, Status Quo, or Chamber of Horror?"(1974), 34 Annales des Droit 129.

Njoya, Adamous N. "African Concept" in UNESCO, *International Dimension of Humanitarian Law* (Paris: Martinus Nijhoff Publishers, 1988) 5.

Nowak, Manfred. "The Effectiveness of the International Covenant on Civil and Political Rights - Stocktaking after the First Eleven Sessions of the U.N. Human Rights Committee"(1980), 1 Human Rights Law Journal 136.

Paul, James C.N. "Participatory Approaches to Human Rights in Sub-Saharan Africa" in An-Naim and Deng ed., *Human Rights in Africa* (Washington D.C.: The Brookings Institution, 1990) 213.

Pollis, Adamantia and Peter Schwab, "Human Rights : A Western Construct with Limited Applicability" in A.Pollis and P.Schwab ed., *Human Rights: Cultural and Ideological Perspective* (New York: Praeger Publisher, 1979) 1.

Prasad, Maya. "The Role of Non-governmental Organizations in the New United Nations Procedures for Human Rights Complaints"(1975), 5 Denver Journal of International Law and Policy 441.

Ramcharan, B.G. "Strategies for the International Protection of Human Rights in the 1990s"(1991), 13 Human Rights Quarterly 155.

Ray, P.L. Jr. and J.S.Taylor, "The Role of Non-governmental Organizations in Implementing Human Rights in Latin America"(1977), 7 Georgia Journal of International and Comparative Law 477.

Ruggie, John G. "Human Rights and the Future International Community"(1983), 112 Daedalus 93.

Sajoo, Amyn B. "Islam and Human Rights: Congruence or Dichotomy?"(1989), 4

Temple International and Comparative Law Journal 23.

Saksena, S.K. "The Individual in Social Thought and Practice" in Charles A.Moore ed., *The Indian Mind: Essentials of Indian Philosophy and Culture* (Honolulu: University of Hawaii press, 1967) 359.

Salzberg, John. "U.N. Prevention of Human Rights Violation: The Bangladesh Case"(1973), 27 International Organization 115.

Sanders, Douglas. "Collective Rights"(1991), 13 Human Rights Quarterly 368.

Scheffer, David J. "Toward a Modern Doctrine of Humanitarian Intervention"(1992), 23 University of Toledo Law Review 253.

Schwelb, Egon. "Civil and Political Rights: The International Measure of Implementation"(1968), 62 American Journal of International Law 827.

--- "The International Measures of Implementation of the International Covenant on Civil and Political Rights and of Optional Protocol"(1977), 12 Texas International Law Journal 141.

Scoble, Harry M. and Laurie S.Wiseberg, "Human Rights NGOs: Note towards Comparative Analysis"(1976), 9 Human Rights Journal 611.

--- "Amnesty International: Evaluating Effectiveness in the Human Rights Arena"(Sept.-Oct., 1976), Intellect 79.

--- "Recent Trends in the Expanding Universe of NGOs Dedicated to the Protection of Human Rights" in V.P.Nanda et al ed., *Global Human Rights: Public Policies, Comparative Measures, and NGO Strategies* (Boulder, Colorado: Westview Press, 1981) 229.

Shepherd, George W.Jr., "Transnational Development of Human Rights: The Third World Crucible" in V.P.Nanda et al ed., *Global Human Rights: Public Policies, Comparative Measures, and NGO Strategies* (Boulder, Colorado: Westview Press, 1981) 213.

Shestack, J.J. "Sisyphus Endures: the International Human Rights NGO"(1978), 24 New York Law School Law Review 89.

--- "The Jurisprudence of Human Rights" in T.Meron ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) 69.

Shimpson, Anthony. "The Role of Indigenous Non-governmental Organizations in Developing Human Rights Standards Applicable to Indigenous Peoples"(1987), 81 Proceedings of the American Society of International Law 282.

Sidorsky, David. "Contemporary Reinterpretations of the Concept of Human Rights" in D.Sidorsky ed., *Essays on Human Rights: Contemporary Issues and Jewish Perspectives* (Philadelphia: Jewish Publication Society of America, 1979) 88.

Sohn, Louis B. "The Human Rights Law in the Charter"(1977), 12 Texas International Law Journal 129.

Suy, Erik. "The Status of Observers in International Organizations"(1978/II), 160 Recueil des Cours de l'Acadermie de Droit international 75.

Takayanagi, K. "A Century of Innovation: The Development of Japanese Law, 1869-1961" in A.Mehren ed., *Law in Japan* (Mass: Harvard University Press, 1963) 5.

Thornberry, Patrick. "Is There a Phoenix in the Ashes? - International Law and Minority Rights"(1980), 15 Texas International Law Journal 421.

Tibi, Bassam. "The European Tradition of Human Rights and the Culture of Islam" in An-Naim and Deng ed., *Human Rights in Africa* (Washington D.C.: The Brookings Institution, 1990) 104.

Tolley, Howard Jr., "Popular Sovereignty and International Law: ICJ Strategies for Human Rights Standard Setting"(1989), 11 Human Rights Quarterly 561.

Totsuka, Etsuro. "Human Rights Activities in the International Society" in Shigeki Miyazaki ed., *Global Problems of Human Rights* (Tokyo: Sanseido, 1988) 112.

--- "The Changing Face of Mental Health Legislation in Japan"(1989), 42 The ICJ Review 67.

Trubek, David. "Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs" in Theodor Meron ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) 205.

Tyagi, Yogesh. "Cooperation between the Human Rights Committee and Nongovernmental Organizations: Permissibilities and Propositions"(1983), 13

Texas International Law Journal 273.

Ullman, Richard. "Human Rights: Toward International Action" in Jorge I.Dominguez et al ed., *Enhancing Global Human Rights* (New York: McGraw-Hill, 1979) 1.

van Boven, Theodoor C., "United Nations and Human Rights: A Critical Appraisal" in A.Cassese ed., *UN Law/ Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979) 119.

--- "Distinguishing Criteria of Human Rights" in Karel Vasak, *The International Dimension of Human Rights* (Connecticut: Greenwood Press, 1982) 43.

--- "The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy"(1990), 20 California Western International Law Journal 207.

--- "Reliance on Norms of Humanitarian Law by United Nations Organizations" in A.J.M.Delissen and G.J.Tania ed., *Humanitarian Law of Armed Conflict: Challenges Ahead* (Massachusetts: Kluwer Academic Publishers, 1991) 495.

--- "The Security Council: The New Frontier"(1992), 48 The ICJ Review 12.

Wai, Dunstan M. "Human Rights in Sub-Saharan Africa" in Adamantia Pollis and P.Schwab ed., *Human Rights: Cultural and Ideological Perspective* (New York: Praeger Publisher, 1979) 115.

Weissbrodt, David, "The Role of International Non-governmental Organizations in the Implementation of Human Rights "(1977), 12 Texas International Law Journal 293.

--- "The Contribution of International Non-governmental Organization to the Protection of Human Rights" in T.Meron ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) 403.

--- and J.McCarthy, "Fact-Finding by International Nongovernmental Human Rights Organizations"(1981), 22 Virginia Journal of International Law 1.

--- et al, "Major Developments in 1990 at the U.N. Commission on Human Rights"(1990), 12 Human Rights Quarterly 559.

Weston, Burns H., "Human Rights"(1984), 6 Human Rights Quarterly 281.

--- "Human Rights" in B.Weston and R.Claude ed., *Human Rights in the World Community* (Philadelphia: University of Pennsylvania Press, 1989) 12.

Wiseberg, Laurie. "Protecting Human Rights Activists and NGOs: What More Can Be Done?"(1991), 13 Human Rights Quarterly 525.

Woo, Kun-yu. "The Anti-Christian Movement of Chinese Students in 1922"(1973), 15 The South Asia Journal of Technology 57.

Woo, P.K.W. "A Metaphysical Approach to Human Rights from a Chinese Point of View" in Rosenbaum ed., *The Philosophy of Human Rights : International Perspective* (Connecticut: Greenwood Press, 1980) 113.

Wright, Quincy. "National Courts and Human Rights - Fujii Case"(1951), 45 American Journal of International Law 62.

"The Limburg Principles on the Implementation of Economic, Social and Cultural Rights"(1987), 9 Human Rights Quarterly 122.

"Medical Treatment of the Mentally Ill and Human Rights Violations in Japan"(1987), 20 Law in Japan 36.

"The UN and former Yugoslavia: Selected Resolutions"(1992), 4 International Journal of Refugee Law 400.

"Warsaw Conference on the Legal Protection of the Rights of the Child"(1979), 22 the ICJ Review 63.